# PLACING COURT RECORDS ONLINE: BALANCING JUDICIAL ACCOUNTABILITY WITH PUBLIC TRUST AND CONFIDENCE

## An Analysis of State Court Electronic Access Policies And a Proposal for South Dakota Court Records

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**Abstract**

With identity theft on the increase and the public's safety at issue, state and federal courts are reexamining electronic access policies governing their court record information. This reexamination necessarily includes a study of the legal traditions underlying public access to court record information balanced against the privacy interests of the public courts serve. The public's trust and confidence in the judicial system demands such a study be undertaken prior to the development and adoption of any court's electronic access policy.

The goal of this research project is to examine the relevant issues surrounding electronic access and recommend a proposal for such access to South Dakota's court records that balances judicial accountability with public trust and confidence, in other words, that permits public access to the activity of the state court system while protecting the privacy interests of the state's citizens. This research paper studies the caselaw governing public access and privacy interests involving court records and the electronic access policy guidelines recently issued by federal and state court administrative organizations. Finally, this paper reviews the ideas and solutions proposed in recent law review publications and presentations by persons interested in access and privacy interests. State constitutions' privacy and public access provisions and state statutes, court rules and policies governing access to court records were researched and are included as appendices to this paper.

Research methodology employed in this project included a survey of South Dakota clerks of court, its citizens, and the attorneys practicing law in South Dakota. This survey collected information regarding current access to clerk of court services and preferred methods of accessing these services in the future. Initially, this survey was undertaken to discover ways to more effectively and efficiently serve South Dakota's rural court users. Use of technology that

would offer more widespread access to the court and to court record information was a natural response to this survey. Research performed for this paper also included a survey of all members of the Conference of State Court Administrators to collect data regarding their states' electronic access policies and the processes used to develop those policies. Additional research included an in-depth study of four selected states' electronic access policies and processes. As part of this study, telephone interviews were conducted with persons in those states who were integral to the development of those access policies to gain additional information about the policy and development process.

Based on the research conducted as described above, recommendations are proposed for an electronic access policy governing South Dakota's court records that balances judicial accountability with the public trust and confidence of its citizenry. These recommendations include: 1) limiting information that is placed in the public court record to protect personally identifying and sensitive information that does nothing to shed light on the workings of the judiciary but that can be used to facilitate criminal activity such as identity theft and credit card fraud; 2) varying the levels of access of information in the court record to allow greater access to parties and their attorneys as well as other non-court government entities to the ultimate benefit of the public; 3) limiting Internet access to court-generated documents in the court record in keeping with the traditions of public access to government records; 4) providing electronic access to public court records at public terminals located at courthouse facilities to benefit the public and court clerks who assist the public in accessing this information; and 5) providing electronic storage of court records using technology that will serve the dual purpose of permitting electronic access while providing archival quality for electronic storage.

The South Dakota Supreme Court recently adopted a rule governing its court records statewide. With the exception of Supreme Court opinions and calendar information which are provided on the South Dakota Unified Judicial System's website, no state court records are presently electronically accessible in South Dakota. However, the future needs of the state's court users and attorneys, and sound business decisions governing operation of court systems, demand that electronic access issues be studied and that a policy be developed that would permit electronic access of South Dakota's court records statewide. South Dakota has an opportunity to learn from the policies and processes used by other state court organizations in developing its own electronic court records access policy. This policy will not only achieve both goals of judicial accountability and public trust and confidence, but will benefit South Dakota's rural court users with more efficient and effective access to court record information, will benefit its court clerks with better use of their time and work efforts, and will benefit its citizens with more cost-effective use of taxpayer dollars.

## I. Introduction

In January 2004, the South Dakota Unified Judicial System completed a year-long study to ascertain the ways in which citizens and attorneys use clerk services in our rural state and the ways in which they would like to access those services in the future. Delivery of core court services to the rural areas of South Dakota had earlier been identified by the UJS Planning and Administrative Advisory Council as a critical issue deserving of study. The study, which was sponsored in part by the State Justice Institute, included surveys of South Dakota's circuit court clerks and its court users, defined as attorneys and the public. The State Court Administrator's Office is using these survey responses to develop innovative and effective ways to provide services to the state's rural population.

The survey responses demonstrated that at least one way to provide better access to clerk services in our rural state is to utilize the recent advances in technology, and specifically, the Internet, for publishing information about the state court system and its services online as well as allowing access to public court record information. However, does placing court records online create new problems for court users? Court records may contain personally identifying information such as social security numbers, names and dates of birth of minor children, financial record information and may also contain sensitive information such as medical records and employment histories. Such information is subject to misuse if widely disseminated.[1] Apart

1. The Federal Trade Commission states that 10 million Americans had their identities stolen in 2003 and each victim spent an average of 530 hours resolving the resulting problems, while the Justice Department reports that identity theft costs United States businesses nearly $50 billion per year in fraudulent transactions. Identity theft is regarded as our country's fastest growing computer-related crime. Terry Frieden, *U.S. Wraps up Net Crime Sweep*, http://money.cnn.com/2004/08/26/technology/cybercrime/index.htm, August 26, 2004*; see also* Jeff Sovern, *The Jewel of Their Souls: Preventing Identify Theft Through Loss Allocation Rules*, 64 U. Pitt. L. Rev. 343 (2003). Persons involved in commission of these crimes use a variety of personally identifiable information in

from identity theft and credit card fraud, public information in court records can be used to commit crimes involving blackmail, extortion, stalking, and sexual assault. Although deemed a privacy interest, the most compelling reason to protect this information is public safety.

When developing an electronic court record access policy, is there a conflict that courts must resolve between access to public records and protecting individual privacy interests? A review of recent news articles, legal scholarship on the subject, and some courts' electronic access policies would suggest so. Some members of the court community believe that court records contain traditionally public information that should be protected and kept private when disseminating these records electronically. Others believe that the information contained in court records, whether in paper or electronic format, should receive equal treatment when courts develop their access policies so that the same record information is publicly available, regardless of the access method. This has been called the "public is public" approach.

Rapid advances in technology have challenged courts to balance the interests between public access to their records and protecting the private information within those records when disseminating them electronically. A significant number of both federal and state court systems

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assuming their victim's identity, including social security numbers, financial and credit card account numbers, telephone numbers and addresses. All of this information is currently publicly available in most court records.

In February 2003, seven co-conspirators who had used personal information obtained from court records, were indicted on federal fraud and identity theft charges. The seven used the federal courts' online database system, PACER, to obtain information about federal inmates and open false financial accounts. In this conspiracy alone, 34 inmates and 20 financial institutions were victimized. Elaine Silvestrini*, Federal Prisoners' Personal Information Used in Credit Fraud*, The Tampa Tribune, Feb. 8, 2003. In Cincinnati, Ohio, a speeding ticket posted on a court clerk's website provided an identity thief with a person's social security number, address, height, weight, birth date and his signature. The thief accumulated $11,000 in credit card theft before his arrest. Jennifer Lee, *Dirty Laundry, Online for All to See*, New York Times, September 5, 2002.

have taken advantage of the technological progress and placed their court records online. Some of these same court systems have recently removed their records from Internet access due to privacy concerns, particularly concerns about identifying information.[2] State and federal court systems are currently in various stages of redeveloping and amending their electronic access policies to address these issues. Although information in court records has long been held to be public information, available for anyone's inspection in the clerks' offices, making these same records available in electronic format, for inspection at any time by anyone worldwide, can have negative and sometimes, unforeseen consequences. Reducing or eliminating negative consequences in developing and implementing an electronic access policy is a goal for any court system. Court systems like South Dakota's, that still have their records in paper format, can learn by studying the processes and the products of court systems with recently retooled electronic access policies in place.[3]

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2. On July 1, 2003, the clerk of court in Butler County, Ohio was ordered to remove domestic relations court records from Internet access due to concerns regarding personal information, including social security numbers and financial information within those records. Janice Morse, *Web Cutoff Causes Butler Backlash*, Cincinnati Enquirer, July 8, 2003; Janice Morse, *Should Records Go On 'Net?,* Cincinnati Enquirer, July 13, 2003; Janice Morse, *Separating Court Records for Net Access May Be Costly*, Cincinnati Enquirer, July 24, 2003; Janice Morse, *Clerk Asks For Web Site Ruling*, Cincinnati Enquirer, October 1, 2003. On November 25, 2003, Florida's Supreme Court Chief Justice issued an 18-month moratorium on posting state court trial documents on the Internet requiring the Manatee County clerk of the court to disable electronic access to court records previously posted pursuant to a legislative mandate. Laurie Cunningham, *Florida Freezes Posting of Online Court Records*, Miami Daily Business Review, December 2, 2003. The Loudon County, Virginia clerk of court suspended electronic access to court records, amidst concerns of identity theft involving social security number and other personal information, just nine days after putting the county's land records online. Dawn Chase, *Loudon Halts Online Land Records Access*, Virginia Lawyers Weekly, August 11, 2003.

3. Only South Dakota Supreme Court opinions and calendar information, but not court files of any kind, are available online and they are posted on the South Dakota Unified Judicial System website. *See* http:www//sdjudicial.com.

This research paper examines the underlying concerns inherent in making court records available electronically, which necessarily includes balancing public access to the courts with protection of our court users' individual privacy interests. This paper begins with a historical review of the legal doctrines involved in the public's access to court records as well as the current legal scholarship in this area, particularly as it concerns electronic access and privacy issues. This paper also looks at the court's interest and authority in protecting the privacy of its litigants and third parties named in court records. The research conducted and presented in this paper includes the surveys of South Dakota circuit court clerks and court users, previously mentioned. It also includes a survey of members of the Conference of State Court Administrators regarding the current status of their court record access policies, as well as telephone interviews of persons involved with the creation and adoption of their state court systems' electronic access policies. Against a background of the applicable legal doctrines, the relevant literature, and the compiled research results, this paper conducts a comparative analysis of selected electronic access policies that have been recently adopted or amended by their state courts. Finally, this paper proposes a policy recommendation for the South Dakota Unified Judicial System's court records that will both improve access to court records statewide and protect court users' private identity information. It is believed that this recommended policy strikes the appropriate balance between judicial accountability and public trust and confidence.

## II. Review of Relevant Literature

### A. Caselaw Addressing Court Records, Public Access, and Privacy Interests

#### 1. United States Supreme Court Decisions

In 1978, in Nixon v. Warner Communications, Inc., a case involving President Richard M. Nixon's "Watergate" taped conversations, the United States Supreme Court cited cases dating back to the 1800's for the proposition that the federal and state courts of this country recognize a general common law right to "inspect and copy public records and documents, including judicial records and documents[.]"[4] The Court acknowledged that the interest in making these records publicly available is the "citizen's desire to keep a watchful eye on the workings of public agencies."[5] Today, the field of court administration recognizes that interest as judicial accountability, one of five trial court performance standards. The Court explained the limitations of this right of access:

> It is uncontested, however, that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, the common-law right of inspection has bowed before the power of a court to insure that its records are not 'used to gratify private spite or promote public scandal' through the publication of 'the painful and sometimes disgusting details of a divorce case.' Similarly, courts have refused to permit their files to serve as reservoirs of libelous statements for press consumption, or as sources of business information that might harm a litigant's competitive standing.[6]

The Court further noted that access to court records is a decision left to the sound discretion of the courts, in light of the relevant facts and circumstances of the particular case. In this

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4. 435 U.S. 589, 598, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978).

5. *Id*. at 598.

6. *Id*. (internal citations omitted).

particular case, the Court held that Nixon's interest in privacy outweighed any public interest of the press, particularly when the only purpose articulated for the release of the tapes was their potential for commercial exploitation.

In 1989, in United States Department of Justice v. Reporters Committee for Freedom of the Press, a case involving criminal "rap sheets" summarized in a computerized database, the United States Supreme Court addressed the privacy issue where records were publicly available at their source but had been compiled into computerized lists.[7] Had the transformation of public information into a compiled database affected the privacy interest? The Court recognized "a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the county and a computerized summary located in a single clearinghouse of information."[8] The Court noted that the privacy interest in public information is substantially affected when the information can be accumulated and stored in a computer long after the public interest in that information has been forgotten. In regard to the government accountability purpose supporting access to public records, the Court stated that purpose:

> is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct. . . . [I]n the typical case in which one private citizen is seeking information about another – the requester does not intend to discover

7. 489 U.S. 749, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989). This case was decided under the federal Freedom of Information Act which is not applicable to court records. 5 U.S.C. §551(1)(B)(2001). The decision is included in the discussion in this paper, however, because it provides the Court's reasoning, analogous to court records, on the issue of whether a government record which is public as an individual record changes character and becomes less public when combined with other public records into a computerized database of information.

8. *Id*. at 764.

> anything about the conduct of the agency that has possession of the requested records."[9]

The Court described the public's interest in releasing information as "shedding light on the conduct of any Government agency or official."[10] Courts have generally held there is a presumption of public access to court records and have made those records publicly available where the purpose of access is related to public scrutiny of the judicial process. On the other hand, courts protect personal information in the same public records where the purpose of access is related to commercial exploitation or potential misuse of the information with no public oversight purpose.[11]

In 1977, in Whalen v. Roe, the United States Supreme Court decided a case involving compiled records of the names and addresses of New York state citizens who had received prescriptions for certain scheduled drugs.[12] Although the Court upheld the constitutionality of the statutes allowing the state to record this information in centralized computer files, the Court addressed the privacy interest in personal information in compiled government records:

> We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed. The right to

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9. *Id*. at 773.

10. *Id*.

11. *Id*. at 780 (when the request seeks no 'official information' about a Government agency, but merely seeks records that the Government agency happens to be storing, the invasion of privacy is 'unwarranted.').

12. 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977).

> collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures.[13]

The Court further recognized that in some circumstances, the "statutory or regulatory duty to avoid unwarranted disclosures" of collected public data is rooted in the Constitution.[14]

Justice Brennan, concurring in the *Whalen* opinion, foresaw the danger of indiscriminate disclosure of public records made accessible on a grander scale by technology. He wrote:

> What is more troubling about this scheme, however, is the central computer storage of the data thus collected. Obviously, as the State argues, collection and storage of data by the State that is in itself legitimate is not rendered unconstitutional simply because new technology makes the State's operations more efficient. However, as the example of the Fourth Amendment shows, the Constitution puts limits not only on the type of information the State may gather, but also on the means it may use to gather it. The central storage and easy accessibility of computerized data vastly increase the potential for abuse of that information, and I am not prepared to say that future developments will not demonstrate the necessity of some curb on such technology.[15]

Today, almost 30 years after Justice Brennan wrote these words, court systems stand at the crossroads of making vast amounts of public court record information easily accessible through computerized databases and Internet use, while searching for "some curb on such technology" or

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13. *Id*. at 605.

14. Note, however, that the United States Supreme Court has never ruled on a constitutional right of access to court records. United States v. McVeigh, 119 F. 3d 806, 811 (10th Cir. 1997) ("There is not yet any definitive Supreme Court ruling on whether there is a constitutional right of access to court documents and, if so, the scope of such a right."). However, some lower courts have recognized a First Amendment right to access to court records. *See In re* National Broadcasting Co., 828 F. 2d 340, 343 (6th Cir. 1987) (press' right of access to judicial records); *In re* Continental Illinois Securities Litigation, 732 F. 2d 1302, 1308-09 (7th Cir. 1984) (public's right of access to court documents). The Supreme Court has a long history of recognizing a First Amendment right belonging to the public and press to attend court proceedings. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) (leading case).

15. *Id*. at 606-07.

other methods to protect the privacy interests of litigants and third parties named in those records.

**2. State Court Decisions**

A few state court decisions have addressed court records and the impact technology has on their compilation and distribution, as well as individual privacy rights. In 1994, a California appeals court reversed a lower court's decision that a seller of criminal background information was entitled to periodic copies of computer tapes created for the Los Angeles municipal court information system.[16] The database included the name, birth date, zip code, case number, date of offense, charges filed, pending court dates, and case disposition for every person against whom criminal charges in the municipal court system were pending. By statute, such compiled information was accessible only by certain persons in the course of their duties and to others who showed a compelling need.[17] The statutes did not provide similar restriction on the same information located in an individual criminal file.

Since the seller showed no need other than his pecuniary interests in the records, the appellate court found that the statute protected the compiled information from disclosure and the state constitutional right to privacy protected defendants from unauthorized disclosure of their criminal information.[18] The seller did not prevail. The court specifically noted "a qualitative

16. Westbrook v. County of Los Angeles, 27 Cal. App. 4th 157, 32 Cal. Rptr. 2d. 382 (Cal. Ct. App. 1994).

17. Despite the presence of these statutes, the seller had been able to collect this information by computer tape monthly from the municipal court system. He now complained that if he were denied access, he would have to travel to 46 municipal court locations to obtain it and that no one would be able to afford what he would have to charge for the information. *Id*. at 160.

18. The court noted that the constitutional amendment that added a privacy right was motivated by a person's ability to control dissemination of personal information. In

difference between obtaining information from a specific docket or on a specified individual, and obtaining docket information on every person against whom criminal charges are pending in the municipal court."[19] The court further noted that the aggregate nature of the information which made it valuable to the seller was the same quality that made its dissemination dangerous. The court concluded as the United States Supreme Court has, that the right of access to public court records is not absolute. "When that right conflicts with the right of privacy, the justification supporting the requested disclosure must be balanced against the risk of harm posed by disclosure."[20]

In 1999, the Colorado Supreme Court, sitting en banc, also addressed a case involving an electronic database of court records, prompted by a request for bulk data from a private entity in the business of selling such information to the public.[21] The information included criminal and civil case record information, such as judgment debtor and creditor information, domestic case filings information, and also included social security and driver's license numbers. Some of this data was protected by statute and the seller requested the State Court Administrator's Office create an electronic database excluding the statutorily protected confidential information.[22] The

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explanation of the amendment, the state election brochure included this statement: "The proliferation of government and business records over which we have no control limits our ability to control our personal lives. Often we do not know that these records even exist and we are certainly unable to determine who has access to them." *Id*. at 166.

19. *Id*. at 165.

20. *Id*. at 166.

21. Office of the State Court Administrator v. Background Information Services, Inc., 994 P. 2d 420 (Colo. 1999).

22. Here, as in *Westbrook*, the SCA denied the request after the seller had been receiving computerized database records for years. In refusing to deliver additional tapes, the SCA cited two specific concerns: 1) trial courts could seal records in criminal files after the

seller asserted that the state's public records law created an implied duty for the SCAO to do so. The lower court ruled in seller's favor and the Colorado Court of Appeals affirmed. The Colorado Supreme Court held on appeal that no state statute required these otherwise public records to be made available to the public in bulk form and absent such, the administrative policies of the Supreme Court governed release of these records. A 1998 Chief Justice Directive permitted the State Court Administrator to deny the request for release of bulk electronic data stored by the state judicial branch.[23]

Again, as in other cases previously discussed, the Colorado Supreme Court noted that courts are the official custodians of their own records, including records compiled into an electronic database. And again, as in other cases, the court recognized that access to electronic bulk data raises very different issues than access to individual case files which are open to public inspection upon request. The court held that "[w]hether access to bulk data should be released and to whom is a matter of important policy that necessarily involves the balancing of individual privacy concerns, public safety, and the public interest in fair and just operation of the court system."[24]

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information had been delivered to seller, making sealed court information still available to the public, and 2) some trial court minute orders contained sexual assault victims' names and the database release of these orders to seller violated state statutes restricting release of victim information. *Id*. at 423.

23. This case has an interesting procedural history. The Chief Justice Directive was issued following the SCA's appeal of the case to the Colorado Court of Appeals but prior to that court's review of the case. Nevertheless, the appeals court affirmed the lower court's ruling that the SCA was obliged to create the database for seller.

24. 994 P. 2d at 429-30. The Court further held the SCA was not required to create a "sanitized," or nonconfidential, version of its computerized records solely for purposes of disclosure. *Id*. at 432 (citing cases).

The private information within public court records, unless sealed by court order or statutory authority, is open to anyone willing to walk into the courthouse, stand in line, sort through the records in the county clerk's office, and pay copying charges. Courts have indicated that the "practical obscurity" of this information, that is, the inherent difficulty in obtaining it, has helped protect its privacy.[25] At least for paper court records, the traditional safeguards within the court's practices have been adequate to protect individual privacy interests. With rapid advances in technology and the ease of availability and dissemination of large amounts of data found in court records, and especially compiled data, traditional protections based on "practical obscurity" are gone. The search for information can now be performed at a computer terminal by anyone anywhere; the information is available in a matter of minutes and in massive amounts, and the cost is minimal. The qualitative change in the method of access eradicates the naturally occurring privacy protections in place with paper records in clerks' offices and demands reexamination of court records access policies.

**B. Response by Federal and State Court Administration**

Traditionally, access issues have been determined by judges on a case-by-case basis or by the control the clerk exercises, at the direction of the court, as custodian of these records. Technological advances have changed the information world so quickly and so recently there has been little time for caselaw to develop that adjusts the balance between publicly accessible electronic court records and protection of individual privacy interests. With no extensive body of caselaw to draw from, court administrators, not judges, find they must develop policies for

25. 489 U.S. at 762.

access to records that will protect private and sensitive information.[26] Electronic access and concomitant privacy issues face their court systems today and these issues will not wait for caselaw to develop. Such policies are being developed following notice, public participation and comment, and careful consideration of not only the public/privacy issues but, as with all good administrative decisions, the costs and benefits to the public and to the court system.

**1. Federal Court Administration Organization Guidelines**

At the federal court level, in April 2003, staff of the Office of Judges Programs of the Administrative Office of the United States Courts updated its 1999 report entitled Privacy and Access to Electronic Case Files: Legal Issues, Judiciary Policy and Practice, and Policy Alternatives.[27] The report recognized that two different approaches to electronic court records were emerging. The first position, the so-called "public is public" approach, assumes that the format of the record should not alter the right of access and that current court practices, mainly orders to seal documents, are adequate to protect privacy interests. The second position relies on the "practical obscurity" of paper records to keep information private while acknowledging that there may need to be limits on information in court records that are distributed electronically. The staff report proposed the federal courts take a third approach that would allow varying levels of access to different stakeholders with electronic access to the entire file available at the clerk's office, but not available on the Internet.

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26. Peter A. Winn, *Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information*, 79 Wash. L. Rev. 307, 321 (2004).

27. Robert Deyling, Privacy and Access to Electronic Case Files: Legal Issues, Judiciary Policy and Practice, and Policy Alternatives, Office of Judges Programs, Adm. Office of the U.S. Courts (1999 & April 2003 Suppl.).

In September 2001, the Judicial Conference of the United States, the principal policy-making arm of the federal court system, adopted a privacy policy for federal civil and bankruptcy court records which is essentially the "public is public" approach. However, the policy offers restrictions on information in both the paper and electronic copies of the record. The policy places the burden of protecting private information in court records squarely on the litigants and their attorneys who file documents with the court, indicating they should examine documents carefully and redact certain information prior to filing and, where necessary, make appropriate motions to protect them from electronic access. Although the Judicial Conference policy recommendations are nonbinding, they are usually followed by federal courts.

The Conference delayed expanding its policy to include criminal files for two years while a pilot program in eleven federal courts studied the potential impact of electronic access to these records. A report on the pilot study was published May 7, 2003.[28] On March 16, 2004, the Judicial Conference approved implementation guidance and a model local rule for electronic access to criminal files, noting that the pilot project concluded that the benefits outweigh any risk of potential harm from enhanced electronic access.[29] This process also included public hearings and receipt of over 240 comments from persons representing public, private and government interests. The public comments noted the many benefits of electronic access to these court records. One frequently mentioned benefit is appropriate to the needs of South Dakota's rural

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28. David Rauma, Remote Public Access to Electronic Criminal Case Records: A Report on a Pilot Project in Eleven Federal Courts, Prepared for the Court Administration and Case Management Committee of the Judicial Conference (2003).

29. The implementation guidance for federal courts and model local rule are available at http://www.uscourts.gov/Press_Releases/implement031604.pdf and http://www.uscourts.gov/Press_Releases/modellocalrule031604.pdf.

court users, that is, that electronic access "levels the geographic playing field" by allowing persons located in great distances from the courthouse to access public information.

The federal court policy as to criminal records, as with its policy for civil and bankruptcy records, places the obligation on the litigants and their attorneys to partially redact specific personal identifying information before filing documents with the court. The policy advises courts to post a notice to that effect which also states that court clerks will not review a party's filings for redaction. The policy states courts will need to begin to routinely check documents the court itself prepares and redact personal information in those documents. Specifically, whether the document is filed on paper or electronically, the policy requires the filer to redact the following:

> Social Security numbers to the last four digits;
> Financial account numbers to the last four digits;
> Names of minor children to the initials;
> Dates of birth to the year; and
> Home addresses to city and state.[30]

The policy also permits parties to file an unredacted document under seal.[31] The court may still require the party to file a redacted copy for the public record.

The privacy policy also protects additional information that may encompass personal security concerns and advises court users that they may wish to file a motion to seal any of their

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30. Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files, Agenda E-6 (Appendix A), March 2004 [hereinafter *Guidance for Implementation*].

31. This complies with the E-Government Act of 2002, Publ. L. No. 107-347, §205(c)(3)(iv), 116 Stat. 2899-2913-15. The Act directs the federal court system to implement access to the Internet by 2004 and directs the Judicial Conference to promulgate rules to address concerns of privacy and security of court record information in light of best practices of federal and state courts.

documents containing this information. This information is listed in the Judicial Conference Policy on Privacy as follows:

> Any personal identifying number, such as driver's license number;
> Medical records, treatment and diagnosis;
> Employment history;
> Individual financial information;
> Proprietary or trade secret information;
> Information regarding an individual's cooperation with the government;
> Information regarding the victim of any criminal activity;
> National security information; and
> Sensitive security information as described in 49 U.S.C. §114(s).[32]

No document that is the subject of a motion to seal, nor the motion itself, will be accessible by the public in any form until the court has ruled on the motion. With the criminal records policy, the court further restricts some record information from becoming public, whether it is in the paper file or electronically-accessed file.[33] It should be noted that the Conference also adopted a policy to make transcripts of court proceedings available electronically. An effective date on this policy is delayed while its impact on court reporter compensation can be assessed.

**2. State Court Administration Organization Guidelines**

On August 1, 2002, at its annual conference in Rockport, Maine, the Conference of Chief Justices and Conference of State Court Administrators voted unanimously to adopt a set of guidelines after two years of notice, public comment, and careful consideration of all of the

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32. *Guidance for Implementation*, *supra* note 30.

33. These documents include unexecuted summonses or warrants of any kind, pretrial bail or presentence investigation reports, statements of reasons in the judgment of conviction, juvenile records, documents containing identifying information about jurors or potential jurors, financial affidavits, ex parte requests for authorization of services pursuant to the Criminal Justice Act, and sealed documents including motions for downward departure for substantial assistance and plea agreements indicating cooperation.

issues involved.[34] Developing CCJ/COSCA Guidelines for Public Access to Court Records: A National Project to Assist State Courts was a project by the National Center for State Courts and Justice Management Institute with support from the State Justice Institute and leadership from the report authors, Martha Wade Steketee and Alan Carlson.[35] They report that during the period of public comment, they received over 130 comments from persons interested in access to court records. Draft versions were reviewed at several meetings of the CCJ and COSCA and at combined meetings of these two state court administrative organizations. The result is a set of guidelines and a process that states can use to develop their own policies regarding access to state court records. The guidelines address court records in both paper and electronic form and although they are premised on a general rule that access should be the same no matter the format, they recognize that some information in court records may be inappropriate for remote electronic access. Essentially, the guidelines advise each state court to determine the types of court record information that should be restricted from remote electronic access and suggest mechanisms for doing so. The commentary to the guidelines suggests this information includes social security numbers, financial identifiers, medical records, and information about minors and third party witnesses and victims.[36] The guidelines make no distinction regarding the end use of bulk downloads of court records data.

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34. Resolution 33, endorsing and supporting *Public Access to Court Records: Guidelines for Policy Development by State Courts*. The Conference of Chief Justices and Conference of State Court Administrators. August 1, 2002.

35. Martha Wade Steketee & Alan Carlson, Nat'l Ctr. For State Courts & Justice Mngmt. Inst., Developing CCJ/COSCA Guidelines for Public Access to Court Records: A National Project to Assist State Courts (2002).

36. *Id*., Commentary to §§ 4.50 and 4.60.

Some state courts, such as Indiana, Minnesota, Nebraska, Maryland, Alaska, Ohio, New Hampshire and South Dakota, have used the guidelines as a starting point to develop their court records rules and are in some stage of the process of adopting them. Each state makes changes to the CCJ/COSCA guidelines that are relevant to its state laws and its form of court records.[37] Many of these state court systems and others have created commissions that are currently studying the public versus privacy issues involved in electronic access to these records.

### 3. Canadian Courts Discussion Paper

The Canadian Judicial Council has also recently released a comprehensive discussion paper on the issue of electronic access to court records.[38] In March 2002, the Council received a report of these issues from its Administration of Justice Committee. The Council referred the report to the Judges Technology Advisory Committee for its contribution, which resulted in the discussion paper. The paper acknowledges the scrutiny that these issues have recently received in the United States where electronic access to court records is more advanced than in Canada. The JTAC did not recommend a model policy, citing the complexity of issues and need to confer with interested stakeholders, but did provide a thorough framework for the development of an electronic access policy. Review of Canada's discussion paper reminds us of the global concept to these issues which is an important consideration as our world "shrinks" with ever-increasing advances in technology and expansion of the information world.

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37. For example, South Dakota's adoption of its version of the guidelines, effective July 1, 2004, references only its paper records as electronic access to court records is not yet available. *See* Appendix J, South Dakota Codified Laws ch. 15-15A (2004).

38. Judges Technology Advisory Committee, Canadian Judicial Council, Discussion Paper on Open Courts, Electronic Access to Court Records, and Privacy (May 2003).

In each of these court administrative documents, the relationship between two fundamental values is recognized and attempts are made to balance them: "the right of the public to transparency in the administration of justice and the right of an individual to privacy."[39] Legal commentators have also recently addressed these interests as they relate to placing court records online and making them available worldwide.

**C. Legal Commentary – Proposed Solutions**

Many authors of law review articles on this topic are not only discussing the legal issues in the public records versus private interests debate, but are proposing practical solutions to resolve the issues and create a system of rules that would protect personal information while maintaining the public court record. Professor of Law Daniel J. Solove declares that "[i]t is time for the public records laws of this country to mature to meet the problems of the Information Age."[40] He writes that a federal baseline, via a congressional act, must be established to govern public records in all states, with the ability for states to adopt even stricter protections of private information in public records. Solove asserts that the federal Privacy Act provides a basis for such legislation but would require amendment to apply to states and to provide more meaningful protection.[41] He advocates regulating the amount of personal information that is placed into public files in the first instance and making information accessible only for certain purposes.

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39. *Id*.

40. Daniel J. Solove, *Access and Aggregation: Public Record, Privacy and the Constitution,* 86 Minn. L. Rev. 1137 (June 2002) (Symposium issue: Modern Studies in Privacy Law) [hereinafter *Solove*].

41. 5 U.S.C. §552a(b). The Privacy Act was enacted in 1974 following years of apprehension and study of computerized databases. However, the Act only applies to the public sector and thus, does not provide the control over use of social security numbers that some had hoped. Private sectors may still collect, disclose and sell social security

Solove supports the enactment of use restriction laws that would limit the use of information contained in public records to its original intended use, that of transparency of government actions. Solove explains that the principle of transparency of government actions has undergone an "ideological drift" and that "[t]ransparency today has become a tool for powerful corporate interests to collect information about individuals to further their own commercial interests, not to shed light on the government."[42] Use restriction laws would not permit personal information in public records to be used for commercial purposes, allowing information brokers to combine data into gigantic online databases that Solove calls "digital biographies."[43] Such use restriction laws would certainly be permissible under the United States Supreme Court's decision in Nixon v. Warner Communications, Inc. in which the right of access

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number information. Moreover, the Act does not extend its protections to court records. 5 U.S.C. §551(1)(B) & 552(f).

For the past several years, Congress has been studying legislation that would protect social security number information in public records, including court records. This legislation, H.R. 2971, would require redaction of social security numbers from court records within two years of enactment. Former COSCA President and Missouri State Court Administrator, Michael L. Buenger, testified June 15, 2004, before Congress regarding the impact such legislation would have on state courts and offering COSCA's willingness to work with Congress toward a viable solution. State court administrators realize it is not a question of whether this legislation will be enacted, but when it will be enacted, and are currently taking proactive steps to protect social security number information in their court records.

42. *Solove* at 1199.

43. Inaccurate information combined piecemeal by large information brokers can impact a nation and the world, beyond the problems of an individual's identity theft. Solove cites errors in the data supplied to Florida election officials by information broker ChoicePoint that prevented many persons from voting in the November 2000 presidential election when these persons were incorrectly identified as felons.

to public records was limited to proper use of the information in those records and where access was denied where such use was only for commercial exploitation.[44]

Kristen M. Blankley, a recent Ohio State Law School graduate, examines several solutions that also include enacting legislation to restrict the information that initially is placed into court records.[45] She proposes that this legislation completely ban the following information from court records: social security numbers, bank account and credit card numbers, driver's license numbers, addresses, and the full names of persons involved in domestic relations matters, such as divorce, child custody and adoption. She suggests that action by state legislation, rather than individual district court rules, would prevent each district's promulgating different rules that may lead to forum shopping and unequal access. However, court rules proposed by a State Court Administrator's Office and adopted by a state's Supreme Court would alleviate these concerns and be a more appropriate way to govern court records than acts by state legislators. In South Dakota, at least, court-made rules carry the same weight and authority as statutes enacted by the legislature.[46]

Blankley suggests if a particular record warrants the use of personally identifying information that this information not be made available for public viewing, either in the paper or

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44. *Supra* note 4.

45. Kristen M. Blankley, *Are Public Records Too Public? Why Personally Identifying Information Should be Removed from Both Online and Print Versions of Court Documents,* 65 Ohio St. L. J. 413 (2004) [hereinafter *Blankley*]. Other solutions discussed by Blankley are increased use of protective orders to seal documents within court records, the proposal of model rules to guide federal and state legislation, such as those developed by CCJ/COSCA, *see* note 35, *supra*, and accompanying text, and amendment of federal and state constitutions to include right to privacy provisions. *Id*. at 445-49. Several state constitutions currently provide for the right to privacy. *See* Appendix B.

46. S.D. Const., Art. V, §12; SDCL 16-3-2.

electronic court records. She proposes that the burden for redacting sensitive information from these court records be placed squarely on the attorneys when they file documents with the court.[47] The Judicial Conference guidelines discussed in Section II, B of this paper also place this responsibility for removing personally identifying information upon the attorneys filing the documents.[48] This will require attorneys to become much more sensitive to the issues of privacy of their clients and communicate the risks of court record disclosures to their clients, so that an informed decision about disclosure and redaction may be made. It is assumed that litigants filing documents pro se will be responsible for redacting their own information. Blankley further proposes that court clerks be responsible for redacting this information from any previously filed documents that would be accessible via the Internet.

To ensure these redaction requirements are complied with, Blankley offers two methods of enforcement. First, an individual could petition the court for removal of personally identifying information she finds in her court documents. This remedy would be available to anyone, without having to show harm as a result of the published information. Second, Blankley proposes a new cause of action against attorneys who place information into court documents without redacting personally identifying information. Blankley proposes that this remedy would only be available upon a showing of actual harm, whether it be economic or psychological, and would be available against any attorney who placed the information in the court files, even those who did not represent the person harmed. Blankley indicates this remedy should also be available to victims of stalking or harassment stemming from the victim's personal information

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47. *Blankley* at 449-50.

48. *Supra* note 29 and accompanying text.

being placed into court records and disseminated online. Presumably, under Blankley's proposal, the court clerks who redact information in previously filed documents would be immune from liability under the protection of sovereign immunity, though that may not be the case in all states.[49]

Beth Givens, Director of the Privacy Rights Clearinghouse, proposes several solutions to reduce the negative consequences of making court records available electronically.[50] She first suggests that courts limit what is posted online to indexes, registers and calendars.[51] Ms. Givens also suggests that courts use only those automation systems that are capable of redacting sensitive information so that this can be viewed by court personnel but blocked from public view.[52] Thirdly, Givens implores courts to adopt rules that protect such information and

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49. For example, in South Dakota, clerks would be immune from suit under sovereign immunity principles only if redacting information in court documents is considered a discretionary duty. It is obvious that such duty would not be discretionary, but would be ministerial and governed by either a state law, court rule or policy of the administrative office of courts, depending on how the state's court record access policy was implemented. *See* Hancock v. Western South Dakota Juvenile Services Center, 2002 SD 69, 647 NW2d 722, 726 ("State employees are cloaked in sovereign immunity when performing discretionary acts because 'such discretionary acts participate in the state's sovereign policy-making power.' Conversely, 'a state employee who fails to perform a merely ministerial duty, is liable for the proximate results of his failure to any person to whom he owes performance of such a duty.'").

50. Beth Givens, Public Records on the Internet: The Privacy Dilemma, Privacy Rights Clearinghouse, San Diego, CA, 2002.

51. This is also suggested by family law attorney Laura W. Morgan who advocates this "two-tier" access approach for particularly sensitive data, including divorce records. *See* Laura Morgan, *Strengthening the Lock on the Bedroom Door: The Case Against Access to Divorce Court Records On Line*, 17 Journal of the American Academy of Matrimonial Lawyers 45 (2001).

52. This suggestion is an excellent one as it allows the work process to drive the use of technology, rather than the other way around. It is also discussed by Gregory M. Silverman, *Rise of the Machines: Justice Information Systems and the Question of Public Access to Court Records Over the Internet*, 79 Wash. L. Rev. 175 (2004) [hereinafter

examine their policy objectives in making their records available online. She also recommends that the information broker industry itself needs regulating and accountability, something that does not currently exist except for the credit industry under the Fair Credit Reporting Act.[53]

Dr. Karen Gottlieb, in a paper presented in 2004 to an international group in Sweden concerned with individual privacy on a global scale, addressed another possible solution to the public versus private issue in court records that is similar to the use restrictions discussed by Professor Solove.[54] Dr. Gottlieb suggested that courts define permissible uses of the court records and state those uses in a data dissemination contract between the court and the end user of the information.[55] She suggests that such a contract be modeled on the Fair Credit Reporting Act's compliance procedures to assure that information would only be used to promote and enhance the justice system.[56] Downstream users of the data would also be required to certify the

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*Silverman*] and is addressed in greater detail within this paper, *infra* in Sections V and VI, Conclusions and Recommendations.

53. The Fair Credit Reporting Act, 15 U.S.C. 1681, is governed by principles which include openness, access to data, correction of data, purpose specification, collection limitation, use limitation, security and accountability.

54. Karen Gottlieb, *Using Court Record Information for Marketing in the United States: It's Public Information, What's the Problem?* Paper presented at the International Workshop on WHOLES – A Multiple View of Individual Privacy in a Networked World, Swedish Institute of Computer Science, Sigtuna, Sweden, January, 2004 [hereinafter Gottlieb].

55. In 1995, Kevin P. Kilpatrick also advocated the use of access contracts between courts and users of electronic court records and provided sample access contracts that courts could revise and adopt for their use. Kevin P. Kilpatrick, The Electronic Handshake: Public Access to Court Databases, National Center for State Courts, 1995 at Appendix C. [hereinafter *Kilpatrick*].

56. *Gottlieb*, *supra* note 54. Dr. Gottlieb states that courts could easily import language directly from portions of the Fair Credit Reporting Act to protect and restrict the use of court record information. In her paper, she provides specific language from the Act that could be used.

purpose for which they seek the information and that they will use the information for no other purpose. The original end user would be liable for civil penalties for improper use of information they directly obtained from the court as well as any improper downstream use of information that they share. Gottlieb's proposal also accommodates access of records that are sold by courts to bulk data distributors.

Dr. Gottlieb spoke of the erosion of public trust and confidence that can occur when courts do not take steps to protect their record information:

> Most people do not realize the information contained in the majority of court records is open to the public. They may suspect the grocery store is selling their buying information for marketing purposes, but they would never think their local court is giving away or selling their court information for a similar purpose.[57]

As was learned through the results of the surveys of court users and as is discussed in greater detail in Section IV, Findings and Analysis of this paper, *infra*, South Dakota courts enjoy a high level of public trust and confidence by its state citizens. When fashioning a policy for electronic access to court records, South Dakota is unwilling to adopt rules that would expose confidential or protected information, thus jeopardizing the relationship currently enjoyed with South Dakota court users. However, close examination of the proposals offered by these legal commentators provides some workable suggestions for a South Dakota policy to improve public access to court records and better serve its rural population while protecting private information.

57. *Id.*

## III. Methodology

Apart from the literature review of relevant cases, state and federal court administrative organizations' policy guidelines, and law review and other articles and presentations described in the previous section, several different data collections were conducted in researching the issues addressed in this paper. Surveys of South Dakota circuit court clerks, attorneys practicing in the state, and South Dakota citizens were performed online, by regular mail and by hand delivery. These in-state surveys focused on access to clerk of court services in both rural and urban areas across South Dakota. Another survey was done of the 56 members of the Conference of State Court Administrators to collect a variety of information about their individual state's electronic access policies and statutes or court rules governing access to court records. Finally, information was gathered from four selected state courts' internet websites and other internet sources regarding their state courts' electronic access policies and processes; follow-up telephone interviews were conducted with court personnel involved with these processes and the development of these policies.

### A. Survey of South Dakota Clerks, Attorneys and the Public

The importance of examining the issue of electronic access to court records arose from a question recently asked by the South Dakota Unified Judicial System's State Court Administrator's Office and the UJS Planning and Administrative Advisory Council: how can the state's judicial system better serve its rural court users? To begin to answer this question, circuit court clerks and court users, defined as both the public and the practicing attorneys in this state, were surveyed to determine what services are currently being used most often and how are they being accessed. The surveys also elicited clerk and public and attorney perceptions regarding different methods of accessing court services in the future. It was believed that the

survey results would reveal ways in which court services could be consolidated or shifted to the less busy, more rural clerks' offices with the end result being that offices in less populated counties could remain open and viable and delivery of clerk of court services across the state could be provided more effectively and efficiently. Moving work processes rather than personnel often depends upon the utilization of technology.

Survey instruments designed by the State Court Administrator's Office were revised several times to clarify the questions asked to assure that the persons responding would understand them correctly. The surveys were then distributed to clerks, attorneys and the public by consultants from the rural sociology department of a local university who had been hired to conduct the survey process and analyze the responses. In July of 2003, all 62 circuit court clerks in all 66 counties of South Dakota were surveyed to obtain information about customer service and access to clerk of court services.[58] This survey was conducted online via the Unified Judicial System's website and received a 100% response rate.

Within the same month, a membership list was obtained from the State Bar Association and 1,350 surveys were mailed to all active members of the South Dakota Bar Association who currently practice law in South Dakota's state courts.[59] The June 2003 State Bar newsletter carried an announcement of the upcoming survey and its purpose. Also, in June, a circuit court judge who is a member of the Unified Judicial System's Planning and Administrative Advisory Council, spoke about the survey to bar members at the annual South Dakota Bar Association meeting. The response rate from the attorney survey was 452, or 33%.

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58. *See* Appendix D, Compiled Results of South Dakota Clerk of Court Surveys.

59. *See* Appendix E, Compiled Results of South Dakota Bar Association Surveys.

During this same time period, surveys were distributed to the South Dakota public by two different methods. To assure the survey would capture responses from at least some of the public who actually used clerk of court services, it was determined that half of the public surveys would be mailed and half would be randomly handed to court users onsite by clerks in each county.[60] The questions in these two surveys were altered somewhat to accommodate those persons who would have just used court services, but the substantive portion of the questions remained identical. It was originally determined that a percentage of each county's population would be surveyed, however, before the surveys were distributed it was decided to oversample some of the lowest-populated rural counties, that is distribute a larger number of surveys in these areas, in hopes of increasing the probable response rate.[61] In total, one thousand public surveys were distributed by mail and clerks randomly handed one thousand public surveys to court users. Of the mailed public surveys, 147 (15%) were completed and returned; of the onsite public surveys, 182 (18%) were completed and returned.

Of the four surveys conducted under this portion of the project only the mailed public survey was randomly distributed. The clerk of court, attorney, and onsite public surveys were not randomly administered and, of course, the survey results cannot be generalized to the entire South Dakota population. However, the information provided by these surveys is descriptive and qualitative and provides the State Court Administrator's Office with valuable information regarding the opinions of court clerks, attorneys practicing in the state, and members of the public, including those persons who actually use South Dakota's court services. All of the

60. *See* Appendices F and G, Compiled Results of South Dakota Mailed Public Surveys and Compiled Results of South Dakota Onsite Public Surveys.

61. For example, using a formula based on percent of county population, only 2 surveys would have originally been distributed in Jones County, which has a population of 1,193.

surveys focused on staffing workloads of the clerks in both rural and urban areas of the state and solicited ideas to improve the level of services to the public and to identify preferred modes of access to those services. The responses identified a range of issues and opinions concerning the availability of clerk of court services throughout South Dakota and are being used by the State Court Administrator's Office to develop both long- and short-term plans for delivery of these services. As indicated previously, technology plays an important role in the development of several new delivery models.[62]

**B. Survey of State Court Administrators**

In 1995, Susan Jennen Larson published a report that provided a comprehensive first look at the privacy and public access issues surrounding electronic court information for many state courts.[63] It provided excellent guidance to state court administrative offices for developing an electronic access policy governing court records. That same year, Kevin Kilpatrick published a report that surveyed and reported the practical mechanics of electronic access policies then in existence.[64] He reported only 9 states then offered electronic access to statewide court

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62. For example, a pilot project is underway in the Fifth Circuit in South Dakota, located in the extreme northeastern part of the state, to determine the feasibility of using interactive video for some court proceedings. On average, the five judges in this circuit travel a total of 55,000 miles annually to hear and determine cases. By electronically placing a judge at certain proceedings, this project reduces our geographical distances and helps mitigate the effects our severe winter weather can have on access to a judge.

63. Susan M. Jennen, Privacy and Public Access to Electronic Court Information: A Guide to Policy Decisions for State Courts, National Center for State Courts, 1995.

64. *See Kilpatrick, supra* note 55. Interestingly, the research for this project included a survey of users of this electronically accessed information. At that time, all of the users wanted more information available to them electronically. "Lawyers indicated a desire for full-text review of filed documents. Investigators listed social security numbers, address histories, and access to juvenile records as high on their lists of wants. Several users also requested direct access into both state and national criminal history

information: Alabama, Connecticut, Kansas, Maryland, New Jersey, Oregon, Utah, Virginia and Washington.[65] Today, 10 years later, 56 state court administrators (including court administrators in United States territories and possessions) were surveyed as part of this research project to determine the current status of their statewide electronic access policies.

The survey of state court administrators was created by this researcher. Prior to its distribution, the survey instrument was reviewed by D.J. Hanson, State Court Administrator for the South Dakota Unified Judicial System in Pierre, South Dakota; Laura Klaversma, advisor to this research project and Court Services Operations Manager, National Center for State Courts in Denver, Colorado; and Susan Jennen Larson, attorney with the Boos, Grajczyk and Larson law firm in Milbank, South Dakota, and nationally recognized expert in the field of private and public access to court records and a former consultant to the National Center for State Courts on these issues. Revisions were made before the survey was distributed by email to members of the Conference of State Court Administrators via the COSCA listserv.[66] A reminder and another copy of the survey were sent by email two weeks later. Another two weeks later a third request for data was made to those state court administrators who had not yet responded. Prior to distribution of the survey, in an effort to boost participation and increase the response rate, it was

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repositories." *Id*. at 37-38. Protection of some of this same information is the motivation for pulling databases offline and reassessing court records access policies today.

65. *Id*. at 35.

66. A copy of the survey was mailed to the court administrator in America Samoa who is not accessible by email.

decided to offer the compiled survey results to any state court administrator who requested them. Of the 56 surveys distributed, 40, or 71%, were completed and returned.[67]

### C. Review of Selected State Court Systems with Electronic Access Policies

A number of state court systems have recently established committees composed of court personnel and interested stakeholders, are holding public hearings and reviewing existing access policies, and are in some stage of the process of adopting electronic access policies that respond to the issues of access to court records and protection of individual privacy interests. This research project examines in-depth those policies, including the policy development processes, that have been very recently adopted or are pending adoption in New York, Maryland, Florida, and Minnesota. These states do not resemble South Dakota in population size, area of rural geography, or court organization. These states were chosen for study because they are on the cutting edge of addressing the balance of judicial accountability and public trust and confidence when making court records available online. Telephone interviews were conducted with persons in those court systems who were involved with the policymaking process to gain additional insight. Specifically, those interviewed included: Geoffrey L. Vincent, E-Systems Development Specialist, Office of Court Administration, Albany, New York; Sally W. Rankin, Court Information Officer for the Maryland Judiciary, Annapolis, Maryland; Stephan Henley, Court Operations Consultant, Strategic Planning, Office of the Florida State Courts Administrator, Tallahassee, Florida; and Michael B. Johnson, Senior Legal Counsel for Minnesota State Court Administration, St. Paul, Minnesota. A thorough discussion of their state court policies and the development processes used in their states is located in Section IV, Findings and Analysis.

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67. *See* Appendix I, Survey of State Court Administrators, and in Section IV, Findings and Analysis, Tables 1-3, the compiled results of this survey.

## IV. Findings and Analysis

### A. Findings from Surveys of South Dakota Clerks, Attorneys and the Public

The compiled responses to these four surveys are shown in Appendices D, E, F, and G. Compiled results of the court users' surveys (that is, attorneys and the public) is shown by question and group in Appendix H. One of the reasons for conducting these surveys was to discover whether the public using court services and the members of the bar practicing in South Dakota would be willing to access clerk of court services in ways that would enable the court to provide those services more effectively and efficiently.[68] The survey responses revealed even more information about the population served in South Dakota than was anticipated. For example, it was apparent from the survey responses that South Dakota's circuit court clerks have developed a relationship of confidence with the public they serve.

The goals of the clerk surveys were to gain knowledge of how the public and attorneys were using clerk of court services as well as gather opinion information from the clerks on possible changes in methods of delivery of these services. The clerks' survey topics included demographic information, types of questions asked by court users, amount of time spent on various duties, method and frequency of access to clerk services, and the clerks' opinions on possible approaches to shifting workloads between rural and urban clerks' offices throughout the state. The goals of the public and attorney surveys were to gather information on their perceptions regarding access to clerk services and alternative methods of delivery of those services. These survey topics included demographic information, frequency of interaction with

68. There were several other goals of this project, not relevant to the discussion within this research paper, that are summarized under the heading "Solutions Project Grant Summary" at the State Justice Institute website. Grant No. SJI-03-N-013, www.statejustice.org.

the court and clerks' offices, court services used during current and prior visits, website usage, preferred method of access and their perceptions on alternative methods of access.

The survey responses revealed that South Dakota court users do not change their residences often. This gives them the opportunity to learn to know and trust the clerks in their county courthouses, especially since most of the state's population lives in a small town.[69] Over 70% of the public who responded to the survey indicated that they have lived within their counties for more than 16 years. Another 10% reported having lived within their counties more than 8 years. The survey revealed that many circuit court clerks spend a significant amount of time answering questions from the public that do not directly relate to clerk of court operations, but are related to activities of other county offices located in the courthouse. Clerks are viewed by many of the public in this state as being the point of contact for information about any of the offices in the county courthouse. Although responding to these questions reduces time available for clerk of court operations, the UJS Planning and Administrative Advisory Council views the time spent by clerks in this manner as good public relations for the state's judicial system. It helps to increase the public trust and confidence in the court system and also demonstrates that the public views the clerks as accessible to them.

Both the public and the attorneys responded that they prefer to have in-person contact with the clerks in conducting their court business, with online access receiving the second greatest number of responses in the mailed public and attorney surveys. The survey also revealed that the state's younger court users are more willing to use technology to access court

69. United States Census Bureau statistics for 2000 show the vast majority of South Dakota towns have populations of less than 5,000 people.

services than older residents.[70] One use of technology that would promote access to the court in a rural state would be to provide electronic access to state court records, which are currently only available in paper format in the clerks' offices in each of the county courthouses. Such use of technology would also free clerk time for other duties, a benefit for those court users who prefer to visit the clerk's office in person or call the clerk's office for information.

South Dakota has a large geographical area, covering 75,885 square miles, for a relatively small population. United States Census Bureau data for 2000 indicates 9.9 persons per square mile statewide; in the rural areas, this number drops significantly.[71] The two most heavily populated cities, Sioux Falls and Rapid City, in the Second and Seventh Judicial Circuits and at the extreme eastern and western parts of the state, have populations of just 123,975 and 59,607, respectively.[72] With South Dakota's vast landscape, the drive to the county courthouse and back

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70. Our younger court users are uniquely adapted to use technology to access and send information. In 1996, then South Dakota Governor William J. Janklow began a program to provide our rural students with the same learning opportunities as students in larger schools. Most of South Dakota's schools are small and rural; almost 40% of them have less than 100 students enrolled in high school. Under Janklow's "Wiring the Schools" and "Connecting the Schools" programs, all schools in South Dakota were wired for computers, the latest computer technology was purchased for use by students, and teachers were specially trained in teaching technology to the students. No other state has created a statewide, centrally managed school network providing this technology to its student population. In 1999, Wired Magazine reported that South Dakota had the most computers per student in the United States. Web-based Education Commission Report, November 06, 2000.

71. Rural counties are defined are those with populations under 2,500. In South Dakota, that includes the following counties: Buffalo, Campbell, Faulk, Haakon, Harding, Hyde, Jerauld, Jones, Mellette, and Sully. These counties are located in the First, Third, Fourth, Fifth, and Sixth Judicial Circuits of the seven judicial circuits that comprise the South Dakota Unified Judicial System. In Campbell County, the population is 2.4 persons per square mile; in Mellette County, it drops to 1.6 persons per square mile. An additional 19 counties of the 66 total counties in South Dakota have populations under 5,000.

72. *See* Appendix A showing South Dakota's population density with concentrations of our population at the extreme eastern and western parts of the state.

for many of its citizens requires several hours of travel. Moreover, because of the small population in the state, four of the sixty-six counties do not have their own courthouses but are served by courthouses in adjacent counties. Also, due to decreased population in rural areas of the state, some clerks of court offices are open less than forty hours per week. Reducing these distances and "expanding" office hours by making court records available electronically in one's home, office, or public library is a logical response given today's technology, and given the survey responses by younger court users, who represent South Dakota's future court users.

**B. Findings from Survey of State Court Administrators**

The data from the survey of state court administrators, found in Tables 1, 2 and 3, was collected and analyzed in September 2004. The issues of public access and privacy interests in electronic access policies governing court records were being debated in most states during the time this research paper was being written and many of the states responding to the survey of state court administrators have policies that were then in some stage of development by their administrative offices or review by their states' highest courts. States with electronic access policies already in place were also reviewing their policies with privacy interests at issue. By publication date of this research paper, May 2005, it is expected that the work of these states on their electronic access policies will have continued and the reader is advised to contact the respective state court administrative offices for updated information on that state's policy development and adoption.

Most notably, the surveys demonstrated that of the 40 state court administrative offices that responded, 33 (83%) have statewide electronic access to court records policies in place or in some stage of development. Significantly, 85% of those policies have either been adopted since

2002, when the CCJ/COSCA guidelines were published, or are currently undergoing review. All but one are the creation of the state court administrator's office or a committee appointed by the state's highest court; Virginia's policy was developed by a legislative committee. Most (70%) provided a period of public comment in the policy development process.

With the exception of a very few, most courts responding to the survey do not publish pleadings or motions online. Rather the documents that receive the most public exposure via electronic access are those created by the court itself – its dockets, calendars, indexes, registers of actions, and case dispositions. Only 12% of the responding states indicated that images of actual documents filed by parties with the court were made available by electronic access. Access to these documents in the other 88% of responding states' court files are still publicly available, but require an in-person visit to the courthouse to view the paper file or a public access terminal. Kentucky described the rationale supporting the distinctions between accessing electronic and paper records in its policy:

> The position of the Kentucky Court of Justice was simple – one requires you to go to a certain building to access the information and the Internet made the information available to the world. Restrictions are applied if you go to the courthouse by distance, hours of operation, operational needs of the court, etc. We simply applied reasonable restrictions based on the business interests of the court and public needs for access to the information.[73]

Of those state court systems that have electronic access policies and completed the survey, there were few states that restricted access based on use of the information or provided different levels of access to information for different users. Some courts, however, did provide more information to members of the state bar in good standing and executive branch law enforcement officers, than they provided to the public. Also, some state statutes prohibited

73. Survey response from Ed Crockett, General Manager, Pretrial Services, Kentucky Administrative Office of the Courts.

commercial use of information acquired through the courts' electronic access systems. Most state courts that responded do provide bulk data access to court record information (65%). Seventy-nine percent of state courts that provide electronic access and completed the survey, charge a fee for electronic access to the court's records.

A copy of the blank survey distributed to the members of the Conference of State Court Administrators is at Appendix I. Tables 1, 2 and 3 follow this discussion and provide a comparative view of the survey responses. A more detailed examination of four state policies and the processes used to develop those policies is described in the next section.

**TABLE 1 – State Court Administrator Survey – Electronic Access Policy Development**

| **STATES** | Responded to Survey | Provides Statewide Electronic Access | Has Statewide Electronic Access Policy | Policy Implemented (Revised) | Policy Development Process | Opportunity for Public Comment | Current Status of Policy |
|---|---|---|---|---|---|---|---|
| **Alabama** | **Yes** | Yes | Yes | 1988 | AOC | No | Implemented |
| **Alaska** | **Yes** | Yes | Yes | 1994 | AOC | No | Committee review (S.Ct. appt'd 2003) |
| Am. Samoa | No | | | | | | |
| **Arizona** | **Yes** | Yes | Yes | 1997 (1999) (draft 2002) | Ct. Comm. | Yes | Under review (approval in 2005) |
| **Arkansas** | **Yes** | No | No (developing) | N/A | N/A | N/A | In development |
| **California** | **Yes** | Yes | Yes | 2002 (2004) | Jud. Council | Yes | Adopted |
| **Colorado** | **Yes** | Yes | Yes | 1998 | Ct. Comm. | Yes | Under revision |
| **Connecticut** | **Yes** | Yes | Yes | 2004 | AOC | Yes | Adopted |
| Delaware | No | | | | | | |
| D.C. | No | | | | | | |
| Florida | No | | | | | | |
| **Georgia** | **Yes** | No | Yes (by statute) | | | | Under review |
| **Guam** | **Yes** | Yes | No (developing) | | | | In development |
| **Hawaii** | **Yes** | Yes | No (developing) | (draft 2004) | AOC | Yes | Under review |
| **Idaho** | **Yes** | No | Yes (by rule) | | | | Under review |
| Illinois | No | | | | | | |
| Indiana | No | | | | | | |
| Iowa | No | | | | | | |
| **Kansas** | **Yes** | No | No (developing) | N/A | AOC | Unknown | In development |
| **Kentucky** | **Yes** | Yes | Yes | 2001 | AOC | No | Adopted |
| Louisiana | No | | | | | | |
| **Maine** | **Yes** | No | No (developing) | N/A | Ct. Comm. | Yes | In development |
| **Maryland** | **Yes** | Yes | Yes | 2004 | Ct. Comm. | Yes | Adopted |
| Massachusetts | No | | | | | | |
| **Michigan** | **Yes** | No | No | N/A | N/A | N/A | N/A |
| **Minnesota** | **Yes** | Yes | Yes | 1987 (draft 2004) | Ct. Comm. | Yes | Under review |
| Mississippi | No | | | | | | |
| **Missouri** | **Yes** | Yes | Yes | 1998 (2000) | Ct. Comm. | Unknown | Adopted |

**TABLE 1 (cont.) – State Court Administrator Survey – Electronic Access Policy Development**

| **STATES** | Responded to Survey | Provides Statewide Electronic Access | Has Statewide Electronic Access Policy | Policy Implemented (Revised) | Policy Development Process | Opportunity for Public Comment | Current Status of Policy |
|---|---|---|---|---|---|---|---|
| **Montana** | **Yes** | No | No | N/A | N/A | N/A | N/A |
| **Nebraska** | **Yes** | Yes | Yes | 2003 | Ct. Comm. | No | Adopted |
| **Nevada** | **Yes** | No | No | N/A | N/A | N/A | N/A |
| **New Hampshire** | **Yes** | No | No (developing) | | Ct. Comm. | Yes | In development |
| **New Jersey** | **Yes** | Yes | Yes | 1996 | Ct. Comm. | Yes | Adopted |
| New Mexico | No | | | | | | |
| New York | No | | | | | | |
| **North Carolina** | **Yes** | Yes | Yes | Unknown | AOC | Unknown | |
| **North Dakota** | **Yes** | Yes | No (developing) | | Ct. Comm. | Unknown | Under review |
| **No. Mariana Isl.** | **Yes** | No | No | N/A | N/A | N/A | N/A |
| **Ohio** | **Yes** | Yes | No (developing) | | Ct. Comm. | Unknown | In development |
| Oklahoma | No | | | | | | |
| **Oregon** | **Yes** | Yes | Yes | 1991 (2003) | AOC | No | Implemented |
| **Pennsylvania** | **Yes** | Yes | Yes | 1994 (1997) | AOC | No | Adopted; new policy in review |
| Puerto Rico | No | | | | | | |
| **Rhode Island** | **Yes** | Yes | Yes | 2002 (draft 2004) | AOC | Yes | Under review |
| **South Carolina** | **Yes** | No | No | N/A | N/A | N/A | N/A |
| **South Dakota** | **Yes** | No | Yes | 2004 | AOC | Yes | Adopted |
| **Tennessee** | **Yes** | No | No | N/A | N/A | N/A | N/A |
| **Texas** | **Yes** | No | No (developing) | (draft 2004) | Ct. Comm. | Yes | Under review |
| **Utah** | **Yes** | Yes | Yes | 1996 (draft 2004) | Ct. Comm. | Yes | Under review |
| **Vermont** | **Yes** | Yes | Yes | 2002 | Ct. Comm. | Yes | Promulgated |
| **Virginia** | **Yes** | Yes | No (developing) | | Leg. Comm. | Unknown | In development |
| Virgin Islands | No | | | | | | |
| **Washington** | **Yes** | Yes | Yes | 1995 (1999) | Ct. Comm. | Yes | Under review |
| West Virginia | No | | | | | | |
| **Wisconsin** | **Yes** | Yes | Yes | 2003 | AOC | No | Implemented |
| **Wyoming** | **Yes** | No | No | N/A | N/A | N/A | N/A |

## TABLE 2 – State Court Administrator Survey – Information Available by Electronic Access and Method of Access

| STATES | Responded to Survey | Information Available Electronically | Information Restricted from Electronic Access | Method of Access | Bulk Data Electronic Access | Bulk Data Restricted | Distribution Method of Bulk Data |
|---|---|---|---|---|---|---|---|
| **Alabama** | **Yes** | Case info. | No | Internet | No | N/A | N/A |
| **Alaska** | **Yes** | Not decided | Not decided | Unknown | Yes | Unknown | Unknown |
| Am. Samoa | No | | | | | | |
| **Arizona** | **Yes** | Case docs, hist. | Yes | Not online | Yes | Non-confid. | Download |
| **Arkansas** | **Yes** | N/A | N/A | N/A | N/A | N/A | N/A |
| **California** | **Yes** | Civil case docs Other-docket | Yes | Internet | No | N/A | N/A |
| **Colorado** | **Yes** | ROA's | Yes | Internet | No | N/A | N/A |
| **Connecticut** | **Yes** | Docket info. | Yes | Internet | Yes | Yes | CD |
| Delaware | No | | | | | | |
| D.C. | No | | | | | | |
| Florida | No | | | | | | |
| **Georgia** | **Yes** | Not decided | Not decided | Not decided | Not decided | Not decided | Not decided |
| **Guam** | **Yes** | Docket info. | Yes | Internet | Yes | Yes | Unknown |
| **Hawaii** | **Yes** | Docket info. | No | Internet | Yes | Yes | Tape, FTP |
| **Idaho** | **Yes** | N/A | N/A | N/A | N/A | N/A | N/A |
| Illinois | No | | | | | | |
| Indiana | No | | | | | | |
| Iowa | No | | | | | | |
| **Kansas** | **Yes** | Docket info. | Yes | Internet | No | N/A | N/A |
| **Kentucky** | **Yes** | Docket info. | Yes | Internet | No | N/A | N/A |
| Louisiana | No | | | | | | |
| **Maine** | **Yes** | N/A | N/A | N/A | N/A | N/A | N/A |
| **Maryland** | **Yes** | Docket info. | No | Internet | Yes | Unknown | Unknown |
| Massachusetts | No | | | | | | |
| **Michigan** | **Yes** | N/A | N/A | N/A | N/A | N/A | N/A |
| **Minnesota** | **Yes** | Ct-created docs | Yes | Internet | Yes | Yes | Unknown |
| Mississippi | No | | | | | | |
| **Missouri** | **Yes** | Docket info. | Yes | Internet | No | N/A | N/A |

TABLE 2
State Court Administrator Survey
Information Available by Electronic Access and Method of Access

**TABLE 2 (cont.) – State Court Administrator Survey – Information Available by Electronic Access and Method of Access**

| STATES | Responded to Survey | Information Available Electronically | Information Restricted from Electronic Access | Method of Access | Bulk Data Electronic Access | Bulk Data Restricted | Distribution Method of Bulk Data |
|---|---|---|---|---|---|---|---|
| **Montana** | **Yes** | N/A | N/A | N/A | N/A | N/A | N/A |
| **Nebraska** | **Yes** | Docket info. | Yes | Internet | No | N/A | N/A |
| **Nevada** | **Yes** | N/A | N/A | N/A | N/A | N/A | N/A |
| **New Hampshire** | **Yes** | N/A | N/A | N/A | N/A | N/A | N/A |
| **New Jersey** | **Yes** | Docket info. | No | Publ.term/ dial-up | Yes | No | Tape or CD |
| New Mexico | No | | | | | | |
| New York | No | | | | | | |
| **North Carolina** | **Yes** | Chg/dispo. | Yes | Publ.term. | Yes | Yes | Unknown |
| **North Dakota** | **Yes** | Docket info. | Yes | Internet | Yes | No | Download |
| **No. Mariana Isl.** | **Yes** | N/A | N/A | N/A | N/A | N/A | N/A |
| **Ohio** | **Yes** | N/A | N/A | N/A | N/A | N/A | N/A |
| Oklahoma | No | | | | | | |
| **Oregon** | **Yes** | Docket info. | Yes | Internet | Yes | No | Monthly CD |
| **Pennsylvania** | **Yes** | Docket info. | Yes | Internet | Yes | Unknown | Unknown |
| Puerto Rico | No | | | | | | |
| **Rhode Island** | **Yes** | Case info. | Yes | Internet | Yes | No | Monthly CD |
| **South Carolina** | **Yes** | N/A | N/A | N/A | N/A | N/A | N/A |
| **South Dakota** | **Yes** | Case info. | Yes | N/A | No | N/A | N/A |
| **Tennessee** | **Yes** | N/A | N/A | N/A | N/A | N/A | N/A |
| **Texas** | **Yes** | Not decided | Not decided | Internet | Not decided | Not decided | Not decided |
| **Utah** | **Yes** | Case histories | Yes | Internet | Yes | Yes | Varies |
| **Vermont** | **Yes** | Docket info. | Yes | Internet | No | N/A | N/A |
| **Virginia** | **Yes** | Case abstracts | Yes | Internet | Yes | Unknown | File transfer |
| Virgin Islands | No | | | | | | |
| **Washington** | **Yes** | Docket info. | No | Internet | Yes | Yes | Qtrly. FTP |
| West Virginia | No | | | | | | |
| **Wisconsin** | **Yes** | Docket info. | Yes | Internet | Yes | No | Download |
| **Wyoming** | **Yes** | N/A | N/A | N/A | N/A | N/A | N/A |

## TABLE 3 – State Court Administrator Survey – Access by User, Use of Information, and Fee Information

| **STATES** | Responded to Survey | Electronic Access Available by the Public | Access by Selected Users Only | Different Level of Access by Different Users | Restriction on Access Based on Use | Method of Restriction | Fees for Access |
|---|---|---|---|---|---|---|---|
| **Alabama** | **Yes** | Yes | No | No | No | N/A | Yes, varies |
| **Alaska** | **Yes** | Not yet | Not decided | Not decided | Not decided | Not decided | Not decided |
| Am. Samoa | No | | | | | | |
| **Arizona** | **Yes** | Yes | No | No | No | N/A | For bulk data (programming) |
| **Arkansas** | **Yes** | N/A | N/A | N/A | N/A | N/A | N/A |
| **California** | **Yes** | Yes | No | No | No | No | No |
| **Colorado** | **Yes** | Yes | No | Yes | On compiled data requests | Written agreement | Yes |
| **Connecticut** | **Yes** | Yes | Yes | Yes | No | N/A | For bulk data |
| Delaware | No | | | | | | |
| D.C. | No | | | | | | |
| Florida | No | | | | | | |
| **Georgia** | **Yes** | Not decided | Not decided | Not decided | Not decided | Not decided | Not decided |
| **Guam** | **Yes** | Yes | Yes | Yes | No | N/A | Not decided |
| **Hawaii** | **Yes** | Yes | No | No | No | N/A | For bulk data |
| **Idaho** | **Yes** | N/A | N/A | N/A | N/A | N/A | N/A |
| Illinois | No | | | | | | |
| Indiana | No | | | | | | |
| Iowa | No | | | | | | |
| **Kansas** | **Yes** | Yes | No | No | By statute | Unknown | Not decided |
| **Kentucky** | **Yes** | Yes | No | Yes | Yes | Agreement & tracking | No |
| Louisiana | No | | | | | | |
| **Maine** | **Yes** | N/A | N/A | N/A | N/A | N/A | N/A |
| **Maryland** | **Yes** | Yes | No | No | No | N/A | For bulk data |
| Massachusetts | No | | | | | | |
| **Michigan** | **Yes** | N/A | N/A | N/A | N/A | N/A | N/A |
| **Minnesota** | **Yes** | Yes | No | Yes | Yes | Written agreement | For bulk data |
| Mississippi | No | | | | | | |
| **Missouri** | **Yes** | Yes | No | No | No | N/A | No |

**TABLE 3 (cont.) – State Court Administrator Survey – Access by User, Use of Information, and Fee Information**

| STATES | Responded to Survey | Electronic Access Available by the Public | Access by Selected Users Only | Different Level of Access by Different Users | Restriction on Access Based on Use | Method of Restriction | Fees for Access |
|---|---|---|---|---|---|---|---|
| **Montana** | **Yes** | N/A | N/A | N/A | N/A | N/A | N/A |
| **Nebraska** | **Yes** | Yes | No | No | Yes | Subscription | Yes |
| **Nevada** | **Yes** | N/A | N/A | N/A | N/A | N/A | N/A |
| **New Hampshire** | **Yes** | N/A | N/A | N/A | N/A | N/A | N/A |
| **New Jersey** | **Yes** | Yes | No | Yes (Attnys) | No | N/A | Bulk data |
| New Mexico | No | | | | | | |
| New York | No | | | | | | |
| **North Carolina** | **Yes** | Yes | No | No | No | N/A | No |
| **North Dakota** | **Yes** | Yes | No | Yes (Attnys) | Yes | Directive | Bulk data |
| **No. Mariana Isl.** | **Yes** | N/A | N/A | N/A | N/A | N/A | N/A |
| **Ohio** | **Yes** | N/A | N/A | N/A | N/A | N/A | N/A |
| Oklahoma | No | | | | | | |
| **Oregon** | **Yes** | Yes | No | No | No | N/A | Yes |
| **Pennsylvania** | **Yes** | Yes | No | Yes (Gov't) | No | N/A | Yes |
| Puerto Rico | No | | | | | | |
| **Rhode Island** | **Yes** | Yes | No | No | No | N/A | Yes |
| **South Carolina** | **Yes** | N/A | N/A | N/A | N/A | N/A | N/A |
| **South Dakota** | **Yes** | Yes | No | No | No | N/A | Yes |
| **Tennessee** | **Yes** | N/A | N/A | N/A | N/A | N/A | N/A |
| **Texas** | **Yes** | Yes | No | No | No | N/A | Yes |
| **Utah** | **Yes** | Yes | No | No | No | N/A | Yes |
| **Vermont** | **Yes** | Yes | Yes | Yes (Crim.Just) | Yes | SCA Review | Yes |
| **Virginia** | **Yes** | Yes | No | No | No | N/A | No |
| Virgin Islands | No | | | | | | |
| **Washington** | **Yes** | Yes | No | Yes (Crim.Just) | Yes | Directive | Yes |
| West Virginia | No | | | | | | |
| **Wisconsin** | **Yes** | Yes | No | Yes (DistAttny) | No | N/A | Bulk data subscription |
| **Wyoming** | **Yes** | N/A | N/A | N/A | N/A | N/A | N/A |

## C. Findings from Review of Selected State Court Systems with Electronic Access Policies

New Jersey courts were among the first to explore the issues of balancing public access with its citizens' privacy interests. In 1996, the New Jersey Supreme Court created a committee that published "The Report of the Public Access Subcommittee of the Judiciary Information Systems Policy Committee." Almost ten years have passed since the publication of this report and online access to information through the Internet has continued to develop, yet early on the New Jersey committee recognized the qualitative difference between paper and electronic records and recommended that electronic distribution of court records be restricted. The committee recommended legislative action, modeled on the protections offered by the Fair Credit Reporting Act. Four years later, the Vermont Supreme Court created a committee to study the issues in its state and published rules governing electronic access, "Rules for Public Access to Court Records." Also in 2000, Arizona released rules that made social security numbers, credit card account numbers and other financial account numbers confidential in both electronic and paper forms of its court records. Washington restricted these same data elements but added address and identity information to the list of protected information from its court records. At the time of this writing, the Washington Supreme Court was considering adoption of a new rule to govern access to court records.

The state court policies selected for closer study here and addressed below are those policies from the states of New York, Maryland, Florida and Minnesota. These state court systems have very recently addressed the issues of personal privacy associated with Internet access to court records. Their policies have been adopted or are pending adoption. As indicated by the state court administrator survey responses, many other state courts are also currently studying these same issues. Review of the various processes described below will assist state

courts that are presently involved in the process or are contemplating the process leading to the adoption of an electronic access policy.

**1. New York**

New York, with 3 million cases filed annually, is the second largest court system in the nation.[74] It began work on a new public access policy in April 2002 with the appointment of the Commission on Public Access to Court Records by New York Supreme Court Chief Judge Judith S. Kaye. The 22-member Commission was chaired by Floyd Abrams, one of the country's pre-eminent lawyers on the First Amendment and privacy issues. Commission members represented a broad array of expertise on these issues and included former New York Times executive editor Joseph Lelyveld and attorneys for The Tribune Company and McGraw-Hill. Other members included law professors, judges and court clerks, and the media.

The Commission began by acquainting itself with the current access rules and practices governing New York court records as well as with the issues involving public access and privacy protection. Subcommittees were established to review relevant law and technology issues, existing policies, and practices in other state and federal court systems. A website was created to accept public comment and to share information among Committee members. Public hearings were held in three sites across the state, Albany, New York City, and Buffalo. A wide range of interested stakeholders offered their views, including members of the public, the New York bar, media, state Attorney General's office, association of court clerks, and advocates for victims of domestic violence. Following the public hearings, the Committee focused on the best approach to govern New York's access policy. On February 24, 2004, it issued its final report to Chief

74. *New York Court Records to Go Online*, News Media Update, The Reporters Committee for Freedom of the Press, February 27, 2004.

Judge Kaye, in which it recommended a policy similar to that of the federal courts, with accommodations for the specific practices and goals of the New York state court system.[75]

The New York report takes the "public is public" approach, the Commission concluding that the "rules and conditions of public access to court case records should be the same whether the records are made available in paper form at the courthouse or electronically over the Internet."[76] However, the Commission also recognized that some information should not be referenced in court records and will only be public information with leave of the court. This information includes social security numbers, financial account and credit card numbers, birth dates, and names of minor children. Like the federal court policy, this information will be protected by redacting social security and financial account numbers to their last four digits, redacting birth dates to the year only and shortening names of minor children to initials. The Commission found that this specific information presented such a risk of harm to privacy and personal security that it should not be maintained in court records at all. Nothing in this policy precludes a motion to the court for additional protection of information in a court record.

The policy also proposes that the New York state court system determine ways to protect at-risk persons, such as victims of domestic violence or stalking, from being identified and located through use of address and telephone information in the court records, but stopped short of proposing a blanket copy to keep all address and telephone information out of court records finding such a policy unnecessary and impractical. Moreover, certain types of cases, such as family law cases and those sealed by court order, will not be available for public access either electronically or at the courthouse in paper form.

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75. Report to the Chief Judge of the State of New York, Commission on Public Access to Court Records, February 2004.

Like the federal court policy, the New York policy proposes that attorneys or self-represented litigants filing documents with the court, whether in paper or electronic form, bear the responsibility of redacting this protected information. The Commission believes placing the burden on attorneys is particularly appropriate since they are subject to court rules and codes of professional conduct. It was recommended that attorneys, pro-se litigants and judges receive education from the court system about electronic access policies and the importance of redacting or excluding the protected information named above.

For the past several years, New York State has permitted electronic filing of court documents. The new electronic access policy will be phased in over a period of five years and will make these court documents available to the public on the Internet. Currently, the New York state court system makes court calendar and other basic information available on the Internet. The Commission proposed that this be expanded to assure that court calendars, case indexes, dockets and judicial opinions of all state courts be available by Internet access. As a pilot program, in the courts in the state that currently permit electronic filing of documents, the New York state court system should begin to make pleadings, transcripts, motions and other papers filed by parties available electronically. The pilot program will allow the court to notify and educate judges, parties, and the public about the access policy and provide the opportunity to test access to these records in this manner before providing statewide access. The policy will apply prospectively to cases filed after its adoption and access via the Internet will be free, or available for a nominal fee, that is, one based on actual cost.

Although not all court records in the state are currently available by electronic access, the policy will govern electronic access for any record filed with the New York state court system.

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76. *Id*. at p. 1.

A minority report filed with the proposed policy urged that there be a time delay between filing the court document and publishing it on the Internet which would allow parties to file an objection with the court. During the time delay, the document would be available in the paper record in the courthouse to anyone. This proposal was not adopted.

**2. Maryland**

In March 2001, Chief Judge Robert M. Bell of the Maryland Court of Appeals appointed the Committee on Access to Court Records to study the issues regarding public access, and especially electronic access, to Maryland's court records.[77] Prior to the appointment of this Committee, an ad hoc committee studied access issues and published a draft policy and administrative order in November 2000. The nature and extent of negative public response to these drafts at a hearing held December 13, 2000 prompted Judge Bell's appointment of the Committee on Access to Court Records in 2001. The new Committee was larger than the ad hoc group and included representation from all interested stakeholders. Retired Court of Special Appeals Judge Paul E. Alpert chaired this Committee.

The Committee met five times in Baltimore at meetings that were open to the public. Minutes of each of these meetings were published on the Court's website. At the first meeting on April 23, 2001, four subcommittees were appointed to consider the issues of identification of the interests and values associated with privacy and access, the relevant legal framework, technological aspects of electronic access and technology currently available in the Maryland court system, and comparisons with other state and federal court access to court records policies. As the Committee's work progressed, a draft report was published on the Court's website and written comments solicited. These comments were considered before the Committee presented

77. The Maryland Court of Appeals is Maryland's highest court.

its final draft report to the Court of Appeals on February 5, 2002. The draft report included general recommendations to the Court, including language from the CCJ/COSCA guidelines for state court access policies, discussed in Section II of this research paper, *supra*, but did not propose specific rules for adoption by the Court.

Upon receipt of the Committee's final draft report, the Court held public hearings and deliberated on the draft report. A subcommittee drafted a new Title 16, Chapter 1000 of the Maryland Rules of Procedure based on the general recommendations in the final report to the Court. These proposed rules were considered by the Court of Appeals at a public hearing held February 9, 2004. On March 4, 2004, the Court amended and adopted the new access rules. The new rules became effective October 1, 2004 and apply to all state courts records in Maryland.[78]

Maryland also has taken a "public is public" approach to its court records access policy, therefore, "a court record in electronic form is open to the public to the same extent as a court record in paper form."[79] The rules do not require that all paper records be converted to electronic form, but where they are so converted, access is the same under the new rules without regard to the form of the record. In all instances where access is available, a clerk is not required to provide access until the record has been docketed or recorded and indexed. The rules further do not require the clerk or the court to "index, compile, re-format, program, or reorganize existing court records or other documents or other information to create a new court record not necessary to be maintained in the ordinary course of business."[80] However, if a new record is

78. Md. Code Ann., Maryland Rules of Procedure §§ 16-1001 – 16-1011 (2004)

79. *Justice Matters*, a publication from the Maryland Judiciary, vol. 8, issue 1, June 2004, pp 2 and 6.

80. Md. Code Ann., Maryland Rules of Procedure § 16-1002(e)(1) (2004).

created by court personnel or if court personnel comes into possession of a new court record created by another from the indexing, compiling, reformatting, programming or reorganizing of court records, documents, or information and there is no basis under the rules to deny access to the public, such access will be provided.

The rules divide court records into four distinct categories with somewhat different treatment for each record type:[81]

1) administrative records –records concerning the operation, administration and management of the court;

2) business license records –records that include applications for business licenses and copies of those licenses that are issued by the clerk;

3) case records –records that include documents filed in connection with judicial proceedings and include applications for and copies of marriage licenses;

4) notice records –records filed with the court pursuant to statute that provide public notice of a record, including deeds, mortgages, financing statements, and liens.

The rules provide that administrative and business license records, categories one and two above, are similar in nature and purpose to those maintained by the executive branch and are, therefore, generally governed by Maryland's Public Information Act. Administrative records include those involving mostly personnel, budgetary, and operational management. They are created by the court itself for its internal operation. This category of records also includes administrative orders of the court.

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81. Under Maryland's new access rules, the term "court records" is a blanket term, referring to all four categories of records and not just case records.

Notice records, category four above, are for the express purpose of providing public notice and are completely open to the public. The Court found that its only function with notice records was in preserving the records and keeping them available for public inspection and that there was no justification for shielding these types of records from public access. Thus, the rules contain no restrictions on their access.

Case records, category three above, are open unless closed by statute, court rule or judge's order. Any case record admitted into evidence or relied upon for purposes of determining a motion is open to the public unless specifically closed by court order, even though the record may not have otherwise been public information. Case records come into being by litigants' filing an action with the court in a judicial proceeding. The Court noted that the exceptions to public access carved out for case records are much narrower than those provided by the state's Public Information Act, which govern the courts' administrative and business license records. These exceptions are by a statute or court rule closing or restricting access to the records or by some compelling need for privacy. All other exceptions that would deny public access are upon examination by a judge on an individual case basis and the result of a court order. The new rules list the types of case records that are confidential pursuant to an existing Maryland statute or court rule.

Specifically protecting individual privacy or sensitive information generally found in case records, the rules deny access to the following:

1) the name, address, telephone number, email address or place of employment of any person who reports the abuse of a vulnerable adult pursuant to Maryland law;

2) except as provided by another statute, the home address or telephone number of a State employee or employee of a political subdivision of the State;

3) any part of a social security number or federal identification number other than the last four digits;

4) information about a person who has received a copy of a sex offender's or sexual predator's registration statement.

Additionally, the party to an action, including an intervenor, or a person who is the subject of a case action or is specifically identified in a case action may file a motion with the court to seal or limit disclosure to an otherwise public case record or to permit inspection of a case record not otherwise subject to inspection under the access rules. Upon the filing of such motion, the record will not be available for public access for a minimum of five business days to allow the court to determine whether to issue a temporary order precluding or permitting inspection. A temporary order may issue where the case record is properly subject to an order precluding or limiting disclosure and there is clear evidence of immediate, substantial and irreparable harm if such relief is not granted. No temporary order permitting inspection of a case record not otherwise subject to inspection under the rules will issue absent the opportunity for a full adversarial hearing. In either case, whether the request is to permit inspection or preclude it, the court requires "a special and compelling reason" to grant the movant's request. If the order limits access, the order must be narrow in scope and duration to meet both the purposes of the access rule and the needs of the movant.

Maryland's policy is unique in the method in which information is redacted from the public record. The rules require that it is the person filing the case record's duty to instruct the

clerk, in writing, whether the records, either in whole or in part, contain information to which public access is to be denied. The clerk is not bound by the filer's determination in this regard and may make an independent judgment whether the case record is subject to inspection. However, if the filer fails to advise the clerk that the record or part of the record is confidential, the clerk is not liable for permitting the record to be publicly inspected even though it contains information that is not publicly accessible under the Maryland access rules. Persons who filed records with the clerk prior to the October 1, 2004 effective date of these rules may advise the clerk in writing whether any part of those records contain information to be restricted from public view. Again, the clerk is not bound by the filer's determination. With these existing records, the clerk shall make a reasonable effort, as time and circumstances allow, to shield the confidential information within these records. All other official duties of the clerk take precedence over this duty.

The clerk's duty, under the new rules, is to make a reasonable and prompt effort to shield confidential information in the record upon its being filed with the clerk and upon the filer's bringing this information to the clerk's attention. Thus, the shielded record is then available for public inspection. An administrative order of the Chief Judge of the Maryland Court of Appeal establishes procedures for the clerk in this regard.

**3. Florida**

In June 2000, the Florida Supreme Court requested its Judicial Management Council, an advisory body to the Supreme Court and the chief justice, to examine the issues relating to balancing privacy interests and public access to information in court records by electronic means. Specifically, the Council was asked to answer the following questions: 1) does the Supreme Court have a role in formulating statewide access policies to its court records or does

responsibility lie elsewhere; 2) if the Court has such responsibility, what steps should it take to ensure policies are developed and implemented; and 3) if statewide policies are developed, should there be a moratorium on electronic access to certain records until policies are developed and implemented?[82] The Council first educated itself through workshops, teleconferences, website demonstrations and organized workgroups. It gathered information on access policies from other states and the federal government and examined the draft guidelines then being developed by CCJ/COSCA. It issued its comprehensive report and recommendations to the Florida Supreme Court November 15, 2001.[83] Its main three recommendations were that the Supreme Court, having ultimate administrative authority over court records, create a statewide policy; that the Supreme Court direct the Council to oversee the policy development process with broad public input; and that a moratorium restricting electronic access to court records be put in place until such policies were developed and implemented.

In regard to the Court's responsibility for formulating policies for its own state court records, it is important to note that the Florida state constitution, article I, section 24, provides a right of access to public records as well as provides that the legislature may exempt records from public access.[84] As noted above, the Judicial Management Council recommended that the Court undertake the development of court record access policies, citing its broad responsibility for

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82. *In re* Report and Recommendations of the Judicial Management Council of Florida on Privacy and Electronic Access to Court Records, 832 So.2d 712, 713 (Fla. 2002).

83. Judicial Management Council of Florida, Privacy and Electronic Access to Court Records, Report and Recommendations, Supreme Court of Florida, Office of the State Courts Administrator, November 15, 2001.

84. At the same time, Florida's state constitution also contains a right of privacy provision at article I, section 23. Montana is the only other state with both a public right of access and a privacy provision in its state constitution. Montana Const. Art. II, §§ 9 and 10. *See* Appendix B.

administrative supervision of all state courts under Florida's state constitution article V, section 2. While agreeing for the most part with the Council's recommendations, the Court deferred action pending completion of a legislative report. The Court noted the Florida State Legislature had instituted a "parallel initiative" in forming a study committee, which included members of the Florida judiciary, to specifically examine electronic access to court records, agency records and interagency exchange of information. This 22-member Study Committee on Public Records was charged with reporting to the Legislature with its findings and recommendations by January 1, 2003.[85] The Court held that "any effort proposed by the Council on this Court's behalf would likely only be redundant to the Legislature's Study Committee on Public Records."[86]

The legislative study committee held nine six-hour meetings, two of which included public hearings in Orlando and Miami. An advisory subcommittee collected information and advised the full committee on issues related to sensitive information in court records and on sharing of information between the court and executive branch state agencies and departments. The full committee submitted its final recommendations to the Governor, Chief Justice of the Florida Supreme Court, President of the Senate and Speaker of the House of Representatives.[87]

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85. The legislative bill, H.B. 1679, signed by Governor Jeb Bush on June 6, 2002, established the study committee and issued a temporary moratorium on unrestricted electronic access to court records, prohibiting Florida's clerks from placing on the Internet copies of military discharge records, death certificates or court records in family, juvenile and probate cases.

86. 832 So.2d at 715.

87. Study Committee on Public Records, Examination of the Effects of Advanced Technologies on Privacy and Public Access to Court Records and Official Records, Final Report, A Committee Created by the Florida Legislature, February 15, 2003.

The recommendations of this legislative committee were fairly consistent with those proposed by Florida's Judicial Management Council. Each proposed the development of a comprehensive statewide access policy while imposing a moratorium on electronic access until the policy is implemented. The legislative study committee also joined the Judicial Management Council's recommendation that the Court adopt policies and rules governing electronic access to its court records. Finally, the legislative committee called upon Florida's courts to minimize the collection of any unnecessary personally identifying data. It should be noted that at the same time these two committees were studying the issues surrounding electronic access, every county clerk in Florida was under a statutory mandate to provide, by January 1, 2002, on a publicly available Internet website, an index of documents located in official records beginning no later than January 1, 1990. In addition to this online index, every clerk was required to provide electronic images of the documents referenced in those indexes by January 1, 2006. Although the legislative mandate was silent as to electronic posting of court records which are not official records, some clerks posted all court records online. This resulted in individuals' social security numbers and financial data contained in court documents being posted on the Internet. Under the legislative mandate, all online documents were available to anyone who paid an access fee.

Following submission of the legislative study committee's report, then Florida Supreme Court Chief Justice Harry Lee Anstead issued an administrative order precluding the Internet posting of court documents, unless they fell within limited exceptions expressed in the order, until a court-appointed committee created a statewide access policy. This order indicated the court needed to address concerns about "the broad release of sensitive or confidential

information through electronic media."[88] Somewhat surprisingly, even open government advocates supported the moratorium imposed by the order, noting some clerks were posting confidential material online that could encourage angry citizens to urge their legislators to enact laws that would place even greater restrictions on public records. An attorney for the First Amendment Foundation, based in Tallahassee, Florida, stated, "We agreed to support the moratorium because we couldn't support the profligacy of some of the clerks."[89] Court documents that continue to be accessible electronically include official records, defined by Florida law to include real estate titles and marriage records, court docket sheets, hearing schedules and calendars, appellate briefs and opinions, court records in cases of "significant public interest" that have been manually inspected by the clerk and confidential information removed, and other files.

Also, following submission of the legislative study committee's final report, then Chief Justice Anstead directed the Judicial Management Council's Ad Hoc workgroup to provide specific guidance on the formation and charge to a policy committee on electronic access to court records. The Committee on Privacy and Court Records was then created, charged with specific tasks and directed to submit a report to the Florida Supreme Court by July 1, 2005.[90]

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88. *Florida Supreme Court Restricts Electronic Access to Court Records*, Reporters Committee on Freedom of the Press, December 2, 2003.

89. *Justices Block Postings of Some Records Online*, Leslie Clark, The Miami World Herald, November 26, 2003.

90. Supreme Court of Florida, Amended Administrative Order No. AOSC04-4, *In re* Committee on Privacy and Court Records, February 12, 2004. This order, which replaced earlier Administrative Order No. AOSC03-49 and was issued nunc pro tunc to November 25, 2003, also clearly defined the limited moratorium on electronic access to court records while the issues were under study, precluding electronic access unless the document fell within one of ten express exemptions.

The 15-member committee is composed of judges, law professors, clerks of court, a court administrator, and attorneys. It is directed by the Court to make three sets of recommendations: 1) strategies to reduce the amount of personal and sensitive information that may unnecessarily become part of a court record; 2) categories of information routinely included in court records that the legislature should consider for public records exemption, and; 3) comprehensive policies to regulate the electronic release of court records, including protection of confidential records and specification of information which is not to be released electronically.

The Committee's work continues, with public hearings and visits with clerks of court around the state of Florida.[91] It anticipates that a draft report will be ready for public comment in March or April of 2005, after which it will review the public comments and submit a final report to the Court.

**4. Minnesota**

The state of Minnesota also continues its work in this area. By order dated January 23, 2003, the Minnesota Supreme Court established its Advisory Committee on Rules of Public Access to Records of the Judicial Branch to study issues surrounding electronic access to state court records and make recommendations to the Court. The Court specifically directed the advisory committee to consider, among other things, the CCJ/COSCA guidelines for developing public access policies by state courts.[92] The 19-member committee obtained a grant from the State Justice Institute to assist it in collecting, organizing and reviewing materials. It also

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91. The Committee held its first meeting in Tampa in April 2004, visited with clerks from Manatee and Sarasota counties in June, and met again in Orlando in August 2004. A public comment period expired November 1 and the Committee met in Tallahassee November 17-18 to hear more public testimony and continue its work to submit a final report to the Court by its July 2005 deadline.

92. The CCJ/COSCA guidelines are discussed at note 35 and accompanying text, *supra*.

solicited the advice of other Minnesota Supreme Court committees, namely, the Implementation Committee on Multicultural Diversity and Fairness in the Courts and the Technology Planning Committee's Data Policy Subcommittee. The advisory committee met sixteen times; it was also informed by presentations from the CCJ/COSCA guidelines staff, Alan Carlson and Martha Wade Steketee; the West Group, a commercial data broker; Beth Givens, Director of the Privacy Rights Clearinghouse; and Donald A. Gemberling, the leading executive branch data access expert in Minnesota. Susan Jennen Larson, a national expert on these issues and previously mentioned in this paper, also assisted with Minnesota's process. The advisory committee posted a preliminary report on the Court's website and solicited public comment at a public hearing. Witnesses who testified at the hearing included representatives of the clergy, media, citizens, public defenders, community groups, court reporters and judges. On June 28, 2004, the advisory committee submitted its comprehensive final report to the Minnesota Supreme Court, using the CCJ/COSCA guidelines to draft proposed access rules. The Supreme Court held a public hearing for consideration of this report and the proposed rules on September 21, 2004.

Among the several approaches to electronic access considered by the advisory committee, the committee specifically noted two in its final report to the Court: 1) the "public is public" approach which allows the same access to all court records, whether the record is electronic or in paper form but which also makes adjustments to the information contained in both forms of the court records; and 2) the "limited publication" approach which recognizes a difference between "public" records and "publishing" records and limits the types of court records which are made available for electronic access while retaining public access in the courthouse to the paper records. The committee recommended the Court adopt the "limited

publication" approach, citing that the CCJ/COSCA Guidelines Committee found, after eighteen months of study, a difference between public court records and publishing court records and noting that state courts that had earlier widely disseminated their court records online have recently taken them offline and reconsidered their access policies in light of privacy concerns.

To protect private information in court records, the advisory committee recommended only publishing electronically those records the court itself generated, that is, the register of actions, calendars, indexes, judgment dockets, and judgments, orders, appellate opinions, and notices prepared by the court.[93] The committee recognized that where these court-generated documents must contain items of information such as a social security number or victim's name, the court has the opportunity to prepare a duplicate copy for Internet access, redacting such private information. The recommended policy lists the private data elements not to be disclosed by remote access, including social security and employer identification numbers, street addresses, telephone numbers, financial account numbers, and the names of jurors, witnesses or victims of a criminal or delinquent act, or any information which specifically identifies the individual.[94] An exception to the limitation of electronic access to court-generated documents is made for high profile cases. The proposed rules allow that documents in these case files could be published electronically by the presiding judge's discretion, with these decisions made on a case-by-case basis and with notice and the opportunity for the parties to be heard in advance of

93. Final Report, Recommendations of the Minnesota Supreme Court Advisory Committee on Rules of Public Access to Records in the Judicial Branch, June 28, 2004, Exhibit A, Proposed Access Rule 8, Subdivision 2(a).

94. *Id*. at Exhibit A, Proposed Access Rule 8, Subdivision 2(b)(1-5).

online publication. The committee noted such publication reduces a significant administrative burden on the clerks for requests for copies of documents in these cases.[95]

The committee's well reasoned explanation for limiting electronic access to court-generated documents is that these documents, because they are prepared and controlled by the court, have integrity. For the most part they are the result of the adjudicatory process and do not contain possibly false allegations that could be included in documents, such as affidavits, filed by the litigants. They also have the advantage of promoting the traditional purpose of public access to court records, and that is, to inform the citizenry and shed light on the work of the judiciary, thus promoting judicial accountability and public trust and confidence in the court system. Limiting electronic access to court-generated documents also makes the most efficient use of court staff time, eliminating the need (and exposure to liability) for clerks to redact confidential information from court document filed by the litigants before scanning them and posting them online.

The advisory committee's final report to the Court also addressed an issue that received the most attention at its public hearings: whether courts should publish unproven criminal allegations, that is, criminal charges that have not yet resulted in a conviction, on the Internet. Statistics were provided in the report that showed a ten-year disparity in the number of African Americans arrested, charged and convicted compared with Caucasians in Minnesota. African Americans, representing only 3.5% of the state's population, are stopped by police at a much greater rate, and are more likely to be arrested, than Caucasians. Charges against African Americans also result in a disproportionate number of dismissals. Once filed with the court, however, the defendant's name and charges appear on the court records available to public

95. *Id*. at Exhibit A, Proposed Access Rule 8, Subdivision 2(e).

viewing anytime and into perpetuity on the Internet. The public's concern at these hearings was the permanent, negative impact on African Americans, especially as they apply for employment and housing. Although court personnel and judges distinguish between charges and convictions, the general public who view these records, including those making employment and housing decisions, often does not.

Media representatives at the public hearings raised opposition to any limits on Internet publication of charged crimes. Their arguments included, *inter alia*, that any injury to these defendants' reputations does not overcome the presumption of public access to this information, that the courts should not try to solve societal problems by protecting this information from Internet access, and that any less immediate access to these court records will result in less accurate, fair and timely news reporting. A few advisory committee members also noted that publishing such information through the court's register of actions helps to hold the police, prosecutors and the courts accountable for their respective roles in the matter.

The committee relied on technology to help resolve the conflicting issues in posting preconviction court records on the Internet. By a close vote, the committee recommended to the Court that such information should be electronically accessible but that automated searching, that is, by non-human entities, and searching by an individual defendant's name be unavailable, except on a public access terminal at the courthouse.[96]

The committee also addressed bulk records, defined as compiled records or information in the court system's computerized databases, in its final report to the Court. The committee was closely divided on the question of how much information should be electronically accessible to

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96. *Id*. at Exhibit A, Proposed Access Rule 8, Subdivision 2(c).

the public in bulk format and included three alternative proposals for the Court to consider. Alternative 1 provides only the release in bulk format of that which is remotely available in subdivision 2 of the proposed rules, that is, register of actions, calendars, indexes, judgment dockets, and judgments, orders, appellate opinions and notices prepared by the court. This alternative also includes the release of preconviction records. Alternative 2, in addition to the records named above, would permit remote access of the court's case and administrative records that are available for public access and includes a proposal that permits requests for nonpublicly accessible or restricted information for "scholarly, journalistic, political, governmental, research, evaluation or statistical purposes where the identification of specific individuals is ancillary to the purpose of the inquiry."[97] Alternative 3 proposes a limitation on bulk record release of preconviction criminal records to those persons who have entered into a written agreement with the Minnesota state court administrator and who further agree not to distribute the information in a manner that would identify individuals who are the subject of the data. Alternative 3 would also permit public access to all other electronic case records that are remotely accessible under this rule and subdivision.

Apart from these alternative proposals, a majority of the advisory committee believed that bulk data that has commercial value should not be placed on the Internet at all for free public access but should be sold by the state court administrator's office for revenue generating fees, based upon copy, compilation and certification charges as well as a reasonable fee.[98] A minority of the committee members believed access to bulk data should be available on the Internet and fees for such information be limited to actual cost of providing the data.

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97. *Id*. at Exhibit A, Proposed Access Rule 8, Subdivision 3(b) (Bulk Data Alternative 2).

98. *Id*. at Exhibit A, Proposed Access Rule 8, Subdivision 6.

The committee made several other recommendations such as what information should be held confidential in court records, whether in paper or electronic format,[99] and recommended a policy for correcting inaccuracies in an electronic court record. Another important recommendation by the committee is that the access rules expressly state that there will be immunity for the custodian of the record for a violation of the access rules, absent willful or malicious violations.[100] This recommendation is important because under most state laws, a decision by the clerk to grant or deny access to information in a court record would be a

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99. For example, race information has been collected by Minnesota's state trial courts at the request of the Minnesota Supreme Court Implementation Committee on Multicultural Diversity and Racial Fairness in the Courts. This information currently appears in bulk data databases but is not retained in the court files related to any case. The Implementation Committee unanimously advised that access to race census data be prohibited from public access in any form except for research purposes pursuant to a court order where those research results will not identify individuals by race. By only a one-vote margin, the committee recommended this position to the Court, but removed the requirement of a court order as long as there is a non-disclosure agreement and the custodian of the record reasonably determines that the disclosure will not compromise the confidentiality of an individual's race *Id*. at Exhibit A, Proposed Access Rule 4, Subdivision 1(e). Also, in a divorce case, social security numbers are currently submitted on a separate confidential information sheet and tax returns submitted in a confidential envelope. The trial court administrator is ultimately responsible for failure to redact this information from court records; the advisory committee proposed to place this burden on the litigants accompanied by education by the court system regarding this process and duty. The proposal also expands confidential information to include financial account numbers and financial documents such as wage stubs and credit card statements. *Id*. at Exhibit D.

100. *Id*. at Exhibit A, Proposed Access Rule 11. This is a commendable proposal which this researcher would like to recommend for South Dakota's record access policy, however, the South Dakota Supreme Court would not have sufficient power and authority to grant immunity to clerks in these instances. The state constitution and statute limits the Court's rulemaking authority to those rules affecting procedural, not substantive law, issues. S.D. Const. Art. V, §12; SDCL 16-3-2. Only the state legislature could grant such immunity in South Dakota.

ministerial duty and thus, the clerk would not be protected from liability under sovereign immunity.[101]

Finally, the committee recommended the Minnesota Supreme Court adopt its proposed policy with an effective date of January 1, 2005. The committee recommended that overall, the Court take a slow and cautious approach to dissemination of court record information over the Internet, noting again that those courts that originally placed all public records online have now pulled those records back offline for further study of the public access versus privacy interest issues. The committee recommended a review of the Court's policy, once adopted, within six to twelve months after implementation and that the committee be reconstituted and that its work be ongoing in this regard.

101. *See* note 49 *supra*.

## V. Conclusions

No government organization collects information about its citizenry that is as broad or as personally identifying and as sensitive in nature as that collected by the court system. Moreover, citizens are generally not in a position to refuse providing this information to the court. It is imperative that the courts themselves, not the legislative or executive branches of government, control this information and develop the rules that will provide public access while protecting private information in its supervision and control. It is a violation of the public's trust and confidence in the judicial system when courts knowingly allow that private information to be accessed for purposes other than that for which the information was originally provided and for reasons other than shedding light on the workings of the judicial system. The United States Supreme Court held in 1989 that:

> a third party's request for . . . information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no 'official information' about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is 'unwarranted.'[102]

The "practical obscurity" that has protected this information for years in paper records no longer exists when records are accessible by electronic means. The balance of public access and privacy interests has shifted with the recent advances in technology.

Although courts, as organizations, are traditionally slow to act, the issue of electronic access to court records and the processes that govern this issue in a particular court system will not wait. Dr. John A. Martin, a Dean with the National Center for State Courts Institute of Court Management's Court Executive Development Program, teaches that the work itself should drive the processes utilized within any court system. With that in mind, the rationale underlying

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102. *Reporters Committee for Freedom of the Press, supra* note 7, at 780.

public access, that is, judicial accountability, should govern the process of electronic access to court records. However, many courts have allowed advances in technology, rather than the work itself, to drive their electronic access processes. Because the Internet exists, some clerks scanned documents in the court records and placed them online for easy access. In those relatively early days of electronic access, little or no thought was placed on the public's privacy interests, only that these were public documents and the technology was available for expanding public access.[103] As previously discussed, these same clerks were required to remove court documents from Internet access while their state court administrative offices and state Supreme Court committees study the issues and develop policies that protect citizens' privacy interests.

Technology is not the enemy, of course. The recent advances in technology have been put to good use in many justice systems across the country in ways that greatly benefit the public and reduce operating costs. Court systems have been able to integrate their vast amounts of information through case management information systems, providing statewide information to the public that was before only available by circuit or by county. Court systems have also been able to share information databases with other state government entities, such as law enforcement, corrections, social services, drivers' licensing, and treatment facilities, thus improving the service levels of all of these governmental organizations to the public. Electronic searches of court systems' criminal record databases by employers at hospitals, schools and day care centers have provided greater protection to the public. In a rural state like South Dakota,

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103. In 1998, the clerk of courts in Cincinnati, Ohio, a former United States attorney, and his 3-person technology staff put together their website before he began electronically posting all court records filed in Hamilton County. *Dirty Laundry for All to See,* Jennifer Lee, New York Times, September 5, 2002. Compare this process with that of New York, Maryland, Florida and Minnesota described in Section IV, Findings and Analysis, all of which involved court commissions, many interested stakeholders, public hearings, and several years of study.

technology is used to move work processes across the state to our less busy offices, allowing county courthouses to remain open and clerk of court services available to the residents in those rural counties.

Technology can also provide a true cost savings for court systems in storing electronic records rather than paper records. One national study done in 1999 by the United States Department of Justice indicated that approximately fifty percent of a court's operating expenses could be attributed to the handling and storage of paper documents.[104] James E. McMillan, Principal Court Management Consultant at the National Center for State Courts, recently estimated it would cost just $25,000 for computer storage space for all of the court records for every court in the state of Arizona.[105] With physical courthouse space at a premium and increasing costs for offsite storage for paper records, electronic storage presents a real advantage to court systems. As good stewards of taxpayers' dollars, courts would be remiss not to explore this use of technology with their court records. As technology continues to advance, courts will find more uses that will ultimately benefit the public they serve.

One particular advance in technology, the development of Extensible Markup Language (XML), has been touted as a solution that permits information in court records to be shared with the public at the courthouse and over the Internet by protecting certain data from access by some

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104. *See Silverman, supra* note 52 at 179.

105. Statement made by James E. McMillan, instructor at the National Center for State Courts Institute for Court Management course on Planning, Acquiring, and Implementing Court Technology, April 26-28, 2004, Williamsburg, Virginia. Compare this figure with the estimated $45,000 spent in FY 2004 by South Dakota's Second Judicial Circuit Court to store off-site approximately 55,000 boxes of case records.

users while allowing other users, such as judges and court personnel, to view the entire record.[106] Using XML, tagged categories of sensitive and personally identifying information in a court record can be automatically and electronically redacted when accessed by the public without requiring the court system to maintain two separate systems of electronic court records – one public and one for use by court personnel. Instead of differentiating access to court records by method of access, electronic or paper file, access will be differentiated by the user. New versions of both Microsoft Word and Adobe Acrobat, used to create Adobe PDF documents, will include support for XML.[107] XML is the computer language chosen by the United States Department of Justice, Office of Justice Programs, in its development of the Global Justice XML Data Model, a program to increase sharing of data information between the justice department and public safety information systems.[108] It is also the language selected by the Organization for the Advancement of Structured Information Standards (OASIS) in developing its LegalXML project. This project produces standards for electronic court filing, court documents, legal citations, transcripts, and criminal justice intelligence systems.[109] Both of these programs are customized to address the unique needs of court systems and the non-court justice community. Even with this "new and improved" technology, it is important to remember to examine the work processes and allow them to be the driving force in decisions made regarding electronic access and information sharing rather than the mere existence of this advanced technology.

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106. *See generally Silverman, supra* note 52.

107. *Silverman, supra* note 52 at 198.

108. *Id.* at 186.

109. *Id*.

Given the research and analysis conducted and which appears in the preceding pages of this paper, it appears the best way to respond to the issue of balancing judicial accountability with public trust and confidence as regards electronic access to court records is to:

1) **Limit Information in the Case Record.** Limit the type of information that is placed in the court's public record, paper or otherwise, thus protecting sensitive and private information that does not shed light on court functions but could be used to gain identifying information that can facilitate criminal activity. Develop methods of collection that allow the court to continue to collect and use such information to the benefit of the public but that protects it from public access;

2) **Vary Levels of Access for Different Users.** Permit differing levels of access to different users of that information, thus allowing attorneys and non-court government entities greater access than the public, which will ultimately benefit the public. Explore the use of XML or other technology which restricts access electronically to the entire court record for various users but that can be accessed by court personnel and judges, thus avoiding duplicative automation systems which reduces costs and the potential for entry errors;

3) **Limit Internet Access to Court-Generated Documents.** Limit public electronic access via the Internet to those documents that are court-generated such as written opinions, judgments, docket sheets, indexes to the court record, and calendars, thus keeping with the traditional rationale for public access to court records of shedding light onto the activities of the judicial

system. Consider Internet access, by judicial discretion, to the entire public file in high-profile cases;

4) **Provide Access to Case Records at Public Terminals in the Clerks' Offices.** Permit access to all public documents in the case records by electronic access at public terminals located at the clerks' offices that can be accessed by court users in the courthouse, thus benefiting the public and the clerks by reducing their need to assist with public access;

5) **Provide Electronic Storage of Case Records.** Provide electronic storage of all case records, which saves space and money, benefiting the courts and the public. Explore technology that would serve dual duty, that is, permitting electronic access to records while also achieving archival storage quality.

A proposal for South Dakota's court records, which includes these recommendations, follows in the next section.

## VI. Recommendations

The South Dakota Supreme Court adopted its Court Records Rule, codified at SDCL ch. 15-15A, effective July 1, 2004. This Rule, as adopted, appears in Appendix J. It was modeled after the CCJ/COSCA Guidelines previously discussed in Section II, Review of Relevant Literature. Although the Rule provides for electronic access to court records, only Supreme Court opinions and calendar items are currently available for electronic access. This information is accessible via the South Dakota Unified Judicial System's website at www.sdjudicial.com. The Rule did not attempt to change any existing law governing court records in the state of South Dakota. It did, however, provide a more restrictive policy in how sealed documents were viewed by the public. Prior to the Rule's adoption, the nature of a document that was sealed was public information; after the Rule's adoption, the only public information available about a sealed document is that a document exists in the court record that is sealed. The type of document under seal is not publicly named.

South Dakota's Court Records Rule, with proposed changes, is provided below. Recommended changes to the current rule stemming from this research project are indicated by striking through existing language and underlining new language. The recommendations recognize the traditional rationale that underlies public access to courts records, that is, to shed light on the workings of the judiciary and the court system. Given that rationale, it is proposed that the recommended policy permit public electronic Internet access to court-generated documents only, with the exception being that in the court's discretion Internet access may be provided to the entire public case record in high-profile cases. This is similar to the approach recommended to the Minnesota Supreme Court by its advisory committee and recognizes the difference between "public" records and "publishing" records. Permitting more widespread

access in high-profile cases also benefits the public and court staff where these records are likely to receive a greater number of requests for access.

However, it is also proposed that nonconfidential documents within case records be electronically made available for public access at terminals located in the clerks' offices across the state. This benefits the public in their ease in accessing court records while benefiting clerks in reducing or eliminating time spent taking out and refiling paper records for public viewing. It is also recommended that electronic storage of these records be explored as a cost-benefit to the courts and indirectly, to the public, of taxpayer dollars. Archival concerns regarding electronic storage must be investigated further; the degree of quality would be expected to rise with advances in technology. Another question is whether the hardware itself will become outdated. The dual purposes and benefits of electronic access and electronic storage should be explored when future technology purchases are considered.

A greater level of access to filed case documents for parties and their attorneys is currently governed by statute. A greater access level is proposed for non-court government entities by database access agreement with the UJS, which would delineate the use of this information and protect confidential information in the court records. It is further proposed that South Dakota's access policy provide protection of that information in paper or electronic court records that is personally identifying or sensitive information and is not appropriate for public dissemination. For example, for now, it is recommended that social security numbers and financial account information be filed separately on a confidential form. As technology advances and electronic access methods change, this paper form would be expected to give way to a completely electronic model. However, taking a tip from Minnesota's Advisory Committee,

it is recommended that South Dakota take a "go-slow" approach and closely observe the ramifications of each step in the process of making its court records accessible electronically.

**UNIFIED JUDICIAL SYSTEM**
**COURT RECORDS RULE**
**SDCL ch. 15-15A**

**SDCL 15-15A-1. Purpose of rule of access to court records.**

The purpose of this rule is to provide a comprehensive policy on access to court records. The rule provides for access in a manner that:

(1) Maximizes accessibility to court records,

(2) Supports the role of the judiciary,

(3) Promotes governmental accountability,

(4) Contributes to public safety,

(5) Minimizes risk of injury to individuals,

(6) Protects individual privacy rights and interests,

(7) Protects proprietary business information,

(8) Minimizes reluctance to use the court to resolve disputes,

(9) Makes most effective use of court and clerk of court staff,

(10) Provides excellent customer service, and

(11) Does not unduly burden the ongoing business of the judiciary.

The rule is intended to provide guidance to 1) litigants, 2) those seeking access to court records, and 3) judges, court and clerk of court personnel responding to requests for access.

**SDCL 15-15A-2. Who has access to court records under the rule.**

Every member of the public has the same access to court records as provided in this rule, except as provided otherwise by statute or rule and except as provided in § 15-15A-7 through 15-15A-9. "Public" includes:

(1) any person and any business or non-profit entity, organization or association;

(2) any governmental agency for which there is no existing policy, statute or rule defining the agency's access to court records;

(3) media organizations.

"Public" does not include:

(4) court or clerk of court employees;

(5) people or entities, private or governmental, who assist the court in providing court services;

(6) public agencies whose access to court records is defined by another statute, rule, order, ~~or~~ policy or database access agreement with the South Dakota Unified Judicial System;

(7) the parties to a case or their lawyers regarding access to the court record in their case, which may be defined by statute or rule.

**SDCL 15-15A-3. Definition of terms.**

(1) "Court record" includes any document, information, or other thing that is collected, received or maintained by a clerk of court in connection with a judicial proceeding. "Court record" does not include other records maintained by the public official who also serves as clerk of court or information gathered,

maintained or stored by a governmental agency or other entity to which the court has access but which is not part of the court record as defined in this section.

(2) Information in a court record "in electronic form" includes information that exists as: (a) electronic representations of text or graphic documents; (b) an electronic image, including a video image, of a document, exhibit or other thing; or (c) data in the fields or files of an electronic database.

(3) "Public access" means that the public may inspect and obtain a copy of the information in a court record unless otherwise prohibited by statute, court rule or a decision by a court of competent jurisdiction. The public may have access to inspect information in a court file upon payment of applicable fees.

(4) "Remote access" means the ability to electronically search, inspect, or copy publicly accessible information in a court record without the need to physically visit the court facility where the court record is maintained. Remote access does not mean the ability to electronically access a public court record on a public terminal located at the court facility where the court record is maintained.

**SDCL 15-15A-4. Applicability of rule.**

This rule applies to all court records, regardless of the physical form of the court record, the method of recording the information in the court record or the method of storage of the information in the court record. Court records that are available to the public by remote access under this rule are those documents that have been generated by the court itself, such as opinions, judgments, docket sheets, registers of actions, indexes, and calendars. In certain high-profile cases, where the judge has so ordered, the entire public file may be accessible by remote access.

**SDCL 15-15A-5. General access rule.**

(1) Information in the court record is accessible to the public except and as prohibited by statute or rule and except as restricted by § 15-15A-7 through 15-15A-10 or § 15-15A-1~~0~~2.

(2) There shall be a publicly accessible indication of the existence of information in a court record to which access has been restricted, which indication shall not disclose the nature of the information protected, i.e., "sealed document."

(3) An individual circuit or a local court may not adopt a more restrictive access policy or otherwise restrict access beyond that provided by statute or in this rule, nor provide greater access than that provided for by statute or in this rule.

**SDCL 15-15A-6. Court records that are only publicly available at a court facility.**

A request to limit public access to information in a court record to a court facility in the jurisdiction may be made by any party to a case, an individual identified in the court record, or on the court's own motion. For good cause, the court will limit the manner of public access. In limiting the manner of access, the court will use the least restrictive means that achieves the purposes of this access rule and the needs of the requestor.

**SDCL 15-15A-7. Court records excluded from public access.**

The following information in a court record is not accessible to the public:

(1) Information that is not to be accessible to the public pursuant to federal law;

(2) Information that is not to be accessible to the public pursuant to state law, court rule or case law as follows;

(3) Examples of such state laws, court rules, or case law follow. Note this may not be a complete listing and the public and court staff are directed to consult state law, court rules or case law. Note also that additional documents are listed below that may not be within court records but are related to the court system; the public and court staff should be aware of access rules relating to these documents.

(a) Abortion records (closed); § 34-23A-7.1

(b) Abuse and neglect files and records (closed, with statutory exceptions); § 26-8A-13

(c) Adoption files and adoption court records (closed, with statutory exceptions); §§ 25-6-15 through 25-6-15.3

(d) Affidavit filed in support of search warrant (sealed if so ordered by court, see statutory directives); § 23A-35-4.1

(e) Attorney discipline records (closed until formal complaint has been filed with Supreme Court by the State Bar Association's Disciplinary Board or Attorney General, accused attorney requests matter be public, or investigation is premised on accused attorney's conviction of a crime); §16-19-99

(f) Civil case filing statements (closed by Supreme Court Rule 03-20);

(g) Coroner's inquest (closed until after arrest directed if inquisition finds criminal involvement with death); § 23-14-12

(h) Custody or visitation dispute mediation proceedings pursuant to § 25-4-60 (closed, inadmissible into evidence)

(i) Discovery material (closed unless admitted into evidence by court) §§ 15-6-26(c); 15-6-5(g)

(j) Domestic abuse victim's location (closed, with statutory exception); § 25-10-39

(k) Employment examination or performance appraisal records maintained by Bureau of Personnel (closed); § 1-27-1

(l) Grand jury proceedings (closed with statutory exceptions); § 23A-5-16

(m) Guardianships and conservatorships (closed with statutory exceptions); § 29A-5-311

(n) Involuntary commitment for alcohol and drug abuse (petition, application, report to circuit court and court's protective custody order sealed; law enforcement or prosecutor may petition the court to examine these documents for limited purpose); § 34-20A-70.2

(o) Judicial disciplinary proceedings (closed until Judicial Qualifications Commission files its recommendation to Supreme Court, accused judge requests matter be public, or investigation is premised on accused judge's conviction of either a felony crime or one involving moral turpitude); ch. 16-1A, Appx. III(1)

(p) Juvenile court records and court proceedings (closed with statutory exception); §§ 26-7A-36 through -38; §§ 26-7A-113 through -116

(q) Mental illness court proceedings and court records (closed); §§ 27A-12-25; 27A-12-25.1 through -32

(r) Pardons (statutory exceptions, see § 24-14-11)

(s) Presentence investigation reports (closed); §§ 23A-27-5 through -10; § 23A-27-47

(t) Probationer under suspended imposition of sentence (record sealed upon successful completion of probation conditions and discharge); §§ 23A-27-13.1; 23A-27-17

(u) Records prepared or maintained by court services officer (closed except by specific order of court); § 23A-27-47

(v) Trade secrets (closed); § 15-6-26(c)(7)

(w) Trusts (sealed upon petition with statutory exceptions); § 21-22-28

(x) Voluntary termination of parental rights proceedings and records (closed except by order of court); § 25-5A-20

(y) Wills (closed with statutory exceptions); § 29A-2-515

(z) Written communication between attorney and client; attorney work product (closed unless such privilege is waived); ch. 16-18, Appx. Rule 1.6

(aa) Information filed with the court pending in camera review (closed)

(bb) Any other record declared to be confidential by law; § 1-27-3.

**SDCL 15-15A-8. Confidential numbers and financial documents excluded from public access.**

The following information in a court record is not accessible to the public.

(a) Social security numbers, employer or taxpayer identification numbers, and financial account numbers of a party or party's child.

(b) Financial documents such as income tax returns, W-2's and schedules, wage stubs, credit card statements, financial institution statements, credit card account statements, check registers, and other financial information.

**SDCL 15-15A-9. Filing confidential numbers and financial documents in court records.**

(a) Social security numbers, employer or taxpayer identification numbers, and financial account numbers of a party or party's child, where required to be filed with the court shall be submitted on a separate Confidential Information Form, appended to these rules, and filed with the pleading or other document required to be filed. The Confidential Information Form is not accessible to the public.

(b) Financial documents named in SDCL 15-15A-8(b) above that are required to be filed with the court shall be submitted as a sealed document and designated as such to the clerk upon filing. The Sealed Financial Documents Information Form appended to these rules shall be attached to financial documents being filed with the court. The Sealed Financial Documents Information Form is confidential and is not accessible to the public. The Sealed Financial Documents will not be publicly accessible unless and until they are formally

admitted into evidence in a hearing or trial. The court may, on its own motion, seal financial source documents that have not been submitted with the Sealed Financial Documents Information Form.

**SDCL 15-15A-~~8~~ 10. Requests for bulk distribution of court records.**

Dissemination of bulk information for resale is prohibited pursuant to § 1-27-1. Any other bulk dissemination is prohibited except as authorized by the State Court Administrator or the Chief Justice of the Supreme Court.

**SDCL 15-15A-~~9~~ 11. Access to compiled information from court records.**

(1) Compiled information is defined as information that is derived from the selection, aggregation or reformulation by the Supreme Court of some of the information from more than one individual court record.

(2) Any member of the public may request compiled information that consists solely of information that is publicly accessible and that is not already available in an existing report. The Supreme Court may compile and provide the information if it determines, in its discretion, that providing the information meets criteria established by the Court, that the resources are available to compile the information and that it is an appropriate use of public resources. The State Court Administrator's Office will make the initial determination as to whether to provide the compiled information.

(a) Compiled information that includes information to which public access has been restricted may be requested by any member of the public only for

scholarly, journalistic, political, governmental, research, evaluation, or statistical purposes.

(b) The request shall a) identify what information is sought; b) describe the purpose for requesting the information and explain how the information will benefit the public interest or public education, and c) explain provisions for the secure protection of any information requested to which public access is restricted or prohibited.

(c) The Supreme Court may grant the request and compile the information if it determines that doing so meets criteria established by the Court, is consistent with the purposes of the access rules, that the resources are available to compile the information, and that it is an appropriate use of public resources.

(d) If the request is granted, the Supreme Court may require the requestor to sign a declaration that:

(ii) The data will not be sold or otherwise distributed directly or indirectly, to third parties, except for journalistic purposes;

(iii) The information will not be used directly or indirectly to sell a product or service to an individual or the general public, except for journalistic purposes; and

(iv) There will be no copying or duplication of information or data provided other than for the stated scholarly, journalistic, political, governmental, research, evaluation, or statistical purpose.

The Supreme Court may make such additional orders as may be needed to protect information to which access has been restricted or prohibited.

**SDCL 15-15A-~~10~~ 12. Requests to prohibit public access to information in court records.** A request to prohibit public access to information in a court record may be made by any party to a case, the individual about whom information is present in the court record, or on the court's own motion. Notice of the request must be provided to all parties in the case and the court may order notice be provided to others with an interest in the matter. The court shall hear any objections from other interested parties to the request to prohibit public access to information in the court record. The court must decide whether there are sufficient grounds to prohibit access according to applicable constitutional, statutory and common law. In deciding this the court should consider the purpose of this rule as set forth in § 15-15A-1. In restricting access, the court will use the least restrictive means that will achieve the purposes of this access rule and the needs of the requestor.

**SDCL 15-15A-~~11~~ 13. When court records may be accessed.**

(1) Court records will be available where available for public access in the courthouse during hours established by the court. Court records in electronic form to which the court allows remote access under this rule will be available for access at least during the hours established by the court for courthouse access, subject to unexpected technical failures or normal system maintenance announced in advance.

(2) Upon receiving a request for access to information the court will respond within a reasonable time regarding the availability of the information and provide the information within a reasonable time.

**SDCL 15-15A-~~12~~ 14. Fees for accessing court records.**

The Supreme Court may charge a fee for access to and copies of court records in electronic form, for remote access or compiled information. The fee shall be reasonable and may include costs for labor, materials and supplies. Fees for record searches are set forth in § 16-2-29.5. Some entities, and other entities under certain conditions, are exempt from paying a record search fee pursuant to § 16-2-29. Copying and certification fees shall be charged as determined by statute or Supreme Court Rule.

**CONFIDENTIAL INFORMATION FORM** (Required by Proposed Rule SDCL 15-15A-9)

_____ Case No. _____
Plaintiff/Petitioner

_____
Defendant/Respondent

**The information on this form is confidential and shall not be placed in a publicly accessible portion of a court record.**

| NAME | SOCIAL SECURITY NUMBER, EMPLOYER IDENTIFICATION NUMBER, TAXPAYER IDENTIFICATION NUMBER, AND FINANCIAL ACCOUNT NUMBERS |
|---|---|
| Plaintiff/Petitioner | _____ |
| 1._____ | _____ |
| 2._____ | _____ |
| 3._____ | _____ |
| Defendant/Respondent | _____ |
| 1._____ | _____ |
| 2._____ | _____ |
| 3._____ | _____ |
| Other Parties (including minor children) | _____ |
| 1._____ | _____ |
| 2._____ | _____ |
| 3._____ | _____ |
| 4._____ | _____ |

Information supplied by: _____

**SEALED FINANCIAL DOCUMENTS INFORMATION FORM**
(Required by Proposed Rule SDCL 15-15A-9)

_____ Case No. _____
Plaintiff/Petitioner

_____
Defendant/Respondent

**The information on this form is confidential and shall not be placed in a publicly accessible portion of a court record.**

_____ Income Tax Records
Period Covered:

_____ Financial Account Statements
Period Covered:

_____ Wage Stubs
Period Covered:

_____ Credit Card Account Statements
Period Covered:

_____ Other:

Information supplied by: _____

Signed: _____

Firm: _____

Address: _____
_____
_____

Date: _____

South Dakota




Black dots indicate dense population.

## APPENDIX B

### State Constitutional Individual's Right to Privacy Provisions

Alaska Const. Art. I, § 22

Arizona Const. Art. II, § 8

California Const. Art. I, § 1

Florida Const. Art. I, § 23

Hawaii Const. Art. I, §§ 6, 7

Illinois Const. Art. I, § 6

Louisiana Const. Art. I, § 5

Montana Const. Art. II, § 10

South Carolina Const. Art. I, § 10

Washington Const. Art. I, § 7

### State Constitutional Public's Right to Know or Right of Access to Public Records Provisions

Florida Const. Art. I, §24

Montana Const. Art. II, §9

New Hampshire Const. Art. 8
(applicable to court records pursuant to *In re* Petition of Keene Sentinel, 136 N.H. 121 (1992)).

## APPENDIX C
## States' Open Records Statutes, Caselaw, Court Rules, Orders and Policies Governing Access to Court Records

**Alabama**

Ala. Code §§ 36-12-40, 36-12-41 (one of the oldest open records act in the country, originally passed in 1915)

Ala. Code § 41-13-1 (public records definition)

Ala. Code § 12-19-180 (fees structure for access to information)

Ala. R. of Jud. Admin. 33 (Dissemination of Computer-Based Court Information with Request Procedures)

**Alaska**

Alaska Stat. §§ 40.25.110, 40.25.120 (Open Records Act, exceptions)

Alaska Stat. §§ 44.99.300 - 350 (Personal Information in Public Records)

Alaska R. of Admin. 35 (Electronic Recording Equipment – Official Court Record – Responsibility of Record)

Alaska R. of Admin. 37.5 (Public Access to Public Records within the Alaska Court System)

Administrative Bulletin 12 (Guidelines for Inspecting and Obtaining Copies of Public Records) (promulgated pursuant to Supreme Court Order No. 503)

Administrative Bulletin 61 (governing case data and reports) (adopted 1994)

**Arizona**

Arizona Supreme Court Rule 29 (court records)

Arizona Supreme Court Rule 123 (public access to judicial records; no financial information shall be available electronically)

**Arkansas**

Ark. Code Ann. § 25-19-103(state Freedom of Information Act definitions)

Ark. Code Ann. § 25-19-105 (public records)

Ark. Code Ann. §§ 25-19-108, -109 (records in electronic format)

Ark. Code Ann. § 29-30-135 (Arkansas Electronic Records Study Commission, 1999)
See: 1999 Ark. Acts 718, An Act to Create the Arkansas Electronic Records and Signature Act

**California**

Cal. Rules of Court Code §§ 2070 – 2077 (Public Access to Electronic Trial Court Records)

Cal. Rules of Court Code § 2073.5 (Remote access allowed in individual criminal cases; interim rule adopted February 27, 2004 and effective until January 1, 2005, permanent rule under consideration)

California Rule of Court § 38 (family law, child support, juvenile law, mental health, probate, criminal law and public offenses cases are not included in electronic records made available through remote access)

**Colorado**

Colo. Rev. Stat. Ann. §§ 24-72-201 – 206 (Open Records Act)

Colo. Rev. Stat. Ann. §§ 24-72-301 - 304 (criminal justice records)

Colorado R. Civ. Proc. 121 (electronic filing; access to attorneys only)

Colorado Court Rules Ch. 38 (Public Access to Records and Information)

Colorado Chief Justice Directive 98-05 (protects financial affidavits, separation agreements, property division orders, custody and child abuse investigation reports and documents the court finds are personal and confidential to the parties that do not require public knowledge through electronic access)

Public Access Policy 98-01 (Policy Concerning the Release of Bulk Data; prohibits release of bulk data) (adopted 12/14/98)

Amended Public Access Policy 98-02 (Policy Concerning the Release of Composite Data) (allows access under conditions) (amended 11/17/00)

Public Access Policy 98-03 (Policy Concerning the Recovery of Costs Related to the Release of Electronic Data) (adopted 12/14/98)

**Connecticut**

Conn. Gen. Stat. §§ 1-200 – 1-219 (Freedom of Information Act)

Conn. Gen. Stat. § 51-36a (access to judicial records)

Conn. Gen. Stat. § 51-193c (filing documents by electronic means)

Conn. Practice Book § 4-4

**Delaware**

Del. Code Ann. tit. 29, §§ 501-526 (Public Records Law)

Del. Code Ann. tit. 29, §§ 10001 - 10005 (Freedom of Information Act)

**District of Columbia**

D.C. Code Ann. §§ 2-531 – 2-540 (Freedom of Information Act)

**Florida**

Fla. Stat.§§ 28.14 – 28.16; 28.2221 (electronic access to official court records)

Fla. Stat. §§ 119.01 – 119.19 (public records)

Rule 2.051, Florida Rules of Judicial Administration (public access to judicial branch records)

Rule 2.075, Florida Rules of Judicial Administration

**Georgia**

Ga. Code Ann. §§ 50-18-70 – 77

**Hawaii**

Haw. Rev. Stat., Ch. 92F (Uniform Information Practices Act)

Haw. Rev. Stat. §§ 571-584 (Family court records closed)

Haw. Rev. Stat. §§ 806-873(b) (Presentence reports closed)

**Idaho**

Idaho Code §§ 9-337 – 9-349 (public records)

ICAR 32 (Sup.Ct. Committee to be appointed later in 2004 to update rule)

**Illinois**

5 Ill. Comp. Stat. §§ 140/ et seq. (Freedom of Information Act)

5 Ill. Comp. Stat. §§ 160/ - 177/ (State Records Act)

**Indiana**

Ind. Code §§ 5-14-3 *et seq.* (Access to Public Records)

Ind. Code §§ 4-1-6 *et seq.* (Fair Information Practices; Privacy of Personal Information)

Supreme Court Administrative Rule 9 (access to electronic court records; generally follows CCJ/COSCA guidelines)

**Iowa**

Iowa Code §§ 22.1 – 22.14 (Iowa Fair Information Practices Act)

**Kansas**

Kan. Stat. Ann.§§ 45-215 – 45-230 (Open Records Act)

Kan. Stat. Ann. § 45-230 (restricts commercial use of public record information)

**Kentucky**

Ky. Rev. Stat. Ann. §§ 61.870 – 61.884 (Open Records Act)

Ky. Rev. Stat. Ann. § 26A.200 (Court records property of Court of Justice)

Ky. Rev. Stat. Ann. § 26A.220 (Supreme Court supervision and control)

Memorandum, Policy Concerning Inspection of Court Records (1985)

*Ex Parte* Farley, 570 S.W.2d 617 (KY 1978) (court records are not subject to the state's Open Records Act but the policies of the Act will apply as a matter of comity so far as that law does not conflict with the Kentucky Supreme Court's control over court records pursuant to Ky. Rev. Stat. Ann. §§ 26A.200 – 26A.220).

**Louisiana**

La. Rev. Stat. Ann. § 44:1 (Public records)

**Maine**

Me. Rev. Stat. Ann. tit. 1, ch. 13 (Public Records)

Me. Rev. Stat. Ann. tit. 1, ch. 14 (Electronic Access to Public Information)

Me. Rev. Stat. Ann. tit. 1, ch. 14A (Notice of Information Practices)

**Maryland**

Md. Code Ann., State Gov't, §§ 10-611 – 10-630 (Access to Public Records)

Md. Code Ann., Rules of Procedure, §§ 16-1001 to 16-1011 (Access to Court Records, effective October 1, 2004)

**Massachusetts**

Mass. Gen. Laws ch. 66, §§ 1-18 (Public Records)

Mass. Gen. Laws ch. 66A, §§ 1-3 (Fair Information Practices)
Mass. Gen. Laws ch. 4, §7(26) (definition of public records)

**Michigan**

Mich. Comp. Laws §§ 15.232 *et seq.* (Freedom of Information Act)
Admin. Rules of Court, Rule 8.119 (Court Records)
Mich. Ct. Admin. Reference Guide, § 8-03 (Records Management)

**Minnesota**

Minn. Stat. §§ 13.01 *et seq.* (Minnesota Government Data Practices Act)
Minn. Stat. § 13.90 (judiciary is exempt from state Data Practices Act)
(Proposed) Rules of Public Access to Records of the Judicial Branch (final report, June 28, 2004)

**Mississippi**

Miss. Code Ann. ch. 25-61 (Mississippi Public Records Act of 1983)
Miss. Code Ann. § 9-1-38 (judicial records developed by judges and their aides are exempt from Mississippi Public Records Act of 1983)

**Missouri**

Mo. Rev. Stat. ch. 109 (Public and Business Records)
Mo. Rev. Stat. § 109.180 (Public records open to inspection)
Mo. Rev. Stat. ch. 483 (miscellaneous statutes regarding court records)
Mo. Rev. Stat. ch. 610 (Governmental Bodies and Records)
Court Operating Rules 1 and 2 (most recently amended in 2000)

**Montana**

Mont. Code Ann. ch. 2-6 (Public Records)

**Nebraska**

Neb. Rev. Stat. § 84-712.01 (public records; citizens' rights)
Neb. Rev. Stat. § 84-712.07 (public records; equitable relief)
Neb. Rev. Stat. § 84-1205.03 (electronic access to public records)
Neb. Rev. Stat. § 84-1205.06 (public records)

**Nevada**

Nev. Rev. Stat. Ann. ch. 239 (Public Records)
Nev. Rev. Stat. Ann. ch. 239A (Disclosure of Financial Records to Government Agencies)
Nev. Rev. Stat. Ann. ch. 239B (Disclosure of Personal Information to Government Agencies)
Nev. Rev. Stat. Ann. §125.080 (divorce proceedings are private on demand of either party)

**New Hampshire**

N.H. Rev. Stat. Ann. ch. 91-A (Access to Public Records and Meetings)

**New Jersey**

N.J. Stat. Ann. § 2B:1-4 (electronic access to court records)
N.J. Stat. Ann. § 47:1A-4 (public policy regarding government records)
N.J. Stat. Ann. § 47:1A-5 (access to records)
New Jersey Court Rule 1:38 (confidentiality of court records)

**New Mexico**

N.M. Stat. Ann. §§ 14-2-1 through 14-2-12 (Inspection of Public Records Act)
N.M. Stat. Ann. §§ 14-3-1 through 14-3-25 (Public Records Act)

**New York**

N.Y. Judiciary Law, ch. 30, Art. 8, §§ 255 (clerks to do search requests), 255-b (public dockets)
N.Y. Pub. Officers Law, ch. 47, Art. 6, §§ 84 – 90 (Freedom of Information Law)
N.Y. Family Court Law, ch. 686, Art. 1, Part 6, § 166 (privacy of family court records)
N.Y. Domestic Relations Law, ch. 14, Art. 13 § 235 (information as to details of matrimonial proceedings)
22 N.Y.C.R.R. § 202.5-a (permitting electronic filing)
22 N.Y.C.R.R. § 216.1, Uniform Rules for the Trial Courts

**North Carolina**

N.C. Gen. Stat. ch. 132 (Public Records Law)

**North Dakota**

N. D. Cent. Code § 44-04-18 (Access to Public Records)
Supreme Court Rule 41 (proposed as of this writing)

**Ohio**

Ohio Rev. Code Ann. § 149.011 (public documents, definitions)
Ohio Rev. Code Ann. § 149.43 (availability of public records)

**Oklahoma**

Okla. Stat. tit. 51, §§ 24A.1 through 24A.28 (Open Records Act)

**Oregon**

Or. Rev. Stat. ch. 7 (Records and Files of Courts)
Or. Rev. Stat. ch. 192 (Public Records Statute)

**Pennsylvania**

Penn. Stat. Ann. tit. 42 §§ 66.1 – 66.9 (West 2002) (Right to Know Law) (enacted 1957, substantially amended 2002; not applicable to court records)
Commw. v. Fenstermaker, 530 A.2d 414 (Pa. 1987) (common law right of access)
Public Access Policy for Pennsylvania Unified Judicial System's District Justice Courts available at: www.courts.state.pa.us/Index/PublicAccess/indexpubaccess.htm.

**Rhode Island**

R.I. Gen. Laws ch. 38-2 (Access to Public Records Act) (includes court records)

**South Carolina**

S.C. Code Ann. ch. 30-2 (Public Records – Family Privacy Protection Act of 2002)

S.C. Code Ann. ch. 30-4 (Public Records - Freedom of Information Act) (governs accessibility of court records)

**South Dakota**

S.D. Codified Laws §1-27-1 (Open Records Act)

S.D. Codified Laws ch.15-15A (Court Records Rule, enacted 2004)

**Tennessee**

Tenn. Code Ann. ch. 10-7 (Public Records Act) (governs court records)

**Texas**

Tex. Gov. Code Ann. ch. 552 (Public Information Act)

Tex. Gov. Code Ann. § 552.0035 (Access to Information of the Judiciary)

Rule 14, Public Access to Court Records (Texas Judicial Council)

**Utah**

Utah Code Ann. ch. 63-2 (Government Records Access & Management Act) (governs court records); see especially § 63-2-701 (applicability to judiciary)

Utah Ct. R. 4-202 (Records Dissemination Rule); see especially R. 4-202.12 (access to electronic data elements)

**Vermont**

Vt. Stat. Ann. tit. 1, §316 (Access to Public Records & Documents)

Vt. Stat. Ann. tit. 1, §317 (Definitions, Public Records & Documents)

VT R RCP Rule 5, VT R RCRP Rule 49, VT R PROB P Rule 5 (requiring parties to redact social security numbers on documents filed with the court unless court requests the number be filed)

Rules for Public Access to Court Records (effective 2001)

Rules Governing Dissemination of Electronic Case Records (effective 2002)

**Virginia**

Va. Code Ann. §§ 2.2-3700 - 3714 (Freedom of Information Act)

Va. Code Ann. §§ 2.2-3800 – 3809 (Government Data Collection & Dissemination Practices Act)

Va. Code Ann. § 17.1-208; §§ 17.1-223 - 254 (clerks and court records); see especially § 17.1-225 (remote access to nonconfidential court records)

2002 Op. Attny. Gen. Va.. 02-095 (presumption of openness of electronic records)

**Washington**

Wash. Rev. Code. tit. 40 (Public Documents, Records & Publications)

Wash. Rev. Code §§ 42.17.250 – 311 (Public Records Access)

Judicial Information System Committee Rule 15 (Data Dissemination of Computer-Based Court Information)

General Rule 22 (Access to Family Law Court Records)

Proposed General Rule-31 (Access to Court Records) (considered by Wash. Sup. Ct. September 9, 2004) (will largely supersede Judicial Information System Data Dissemination Policy)

**West Virginia**

W. Va. Code ch. 29B (Freedom of Information Act) (applies to court records)

**Wisconsin**

Wis. Stat. §§ 19.21 – 19.39 (Open Records Law)

Policy on Disclosure of Public Information Over the Internet (Director of State Courts, implemented May 6, 2003)

**Wyoming**

Wyo. Stat. §§ 16-4-201 - 205 (Public Records Act)

Wyo. Stat. § 5-9-153 (Circuit Court records open during business hours)

Wyo. Uniform Rules for Circuit Courts, Rule 2, Record Checks

Wyo. Uniform Rules for District Courts, Rule 305, Fee for Records Checks

**APPENDIX D**
**COMPILED RESULTS OF SOUTH DAKOTA CLERK OF COURT SURVEYS**

1. My office is located in _____ county. = All 66 counties are represented.

2. My office is open and staffed:

____ 40 hours per week = 50
____ 30 - 39 hours per week = 3
____ 20 - 29 hours per week = 12

3. I have been working in this position for: (check one)

____ Less than 1 year = 2
____ 1-5 years = 19
____ 6-10 years = 7
____ 11-15 years = 8
____ 16-19 years = 10
____ 20 years or more = 16

4. Approximately how many hours per week does your office spend on criminal processing?

____ 0 - 4 hours per week = 4
____ 4 - 8 hours per week = 9
____ 8 - 20 hours per week = 19
____ 20 - 30 hours per week = 13
____ More than 30 hours per week = 17

5. Approximately how many hours per week does your office spend on civil processing (to include all civil processing other than small claims and juvenile matters)?

____ 0 - 4 hours per week = 7
____ 4 - 8 hours per week = 19
____ 8 - 20 hours per week = 18
____ 20 - 30 hours per week = 3
____ More than 30 hours per week = 13

6. Approximately how many hours per week does your office spend on small claims processing?

____ 0 - 4 hours per week = 21
____ 4 - 8 hours per week = 15
____ 8 - 20 hours per week = 16
____ 20 - 30 hours per week = 4

____ More than 30 hours per week = 4

7. Approximately how many hours per week does your office spend on juvenile processing?

____ 0 - 4 hours per week = 29
____ 4 - 8 hours per week = 13
____ 8 - 20 hours per week = 10
____ 20 - 30 hours per week = 7
____ More than 30 hours per week = 2

8. Approximately how many hours per week does your office spend on non-case work?

____ 0 - 4 hours per week = 14
____ 4 - 8 hours per week = 12
____ 8 - 20 hours per week = 23
____ 20 - 30 hours per week = 7
____ More than 30 hours per week = 4

9. Please provide examples of the type of non-case work your office spends the most time with (i.e., marriages, passports, billings, etc.):

The most frequent responses to these open-ended questions included: passports; billings; marriages; monthly reports; jury lists; phone calls; making copies for the public and copies of files for attorneys; criminal record searches; general questions; and data processing.

10. On a daily basis, how many customers do you serve at your counter?

____ 0 - 5 per day = 17
____ 6 - 10 per day = 16
____ 11 - 25 per day = 17
____ 26 - 50 per day = 5
____ 51 or more per day = 6

11. Estimate the average number of minutes used in responding to each customer question:

____ 0 - 5 minutes = 15
____ 6 - 10 minutes = 29
____ 11 - 15 minutes = 17
____ More than 15 minutes = 0

12. Of those customer questions in Question 10, how many in your opinion **do not** directly relate to clerk or court operations?

____ 0 - 5 per day = 49
____ 6 - 10 per day = 10
____ 11 - 25 per day = 2

____ 26 - 50 per day = 0
____ 51 or more per day = 0

13. Of the questions that pertain to your operation, what are the most frequent questions? (please explain)

    The most frequent responses to this open-ended question included: what will the judge do; how to do small claims; how much is my fine and can I make payments; where do I go for DUI classes; how does one get a satisfied judgment removed from a credit history; how can I obtain a pro se divorce; and questions often bordering on legal advice.

14. On a daily basis, how many phone calls does your office receive from the public?

____ 0 - 5 per day = 1
____ 6 - 10 per day = 17
____ 11 - 25 per day = 19
____ 26 - 50 per day = 9
____ 51 or more per day = 14

15. How many of the calls in Question 14, in your opinion, **do not** relate directly to clerk or court operations?

____ 0 - 5 per day = 38
____ 6 - 10 per day = 12
____ 11 - 25 per day = 8
____ 26 - 50 per day = 2
____ 51 or more per day = 0

16. Of those calls that pertain to your operation, what are the most frequent questions? (please explain)

    Responses included: questions concerning how to get car tags; how to obtain birth certificates; small claims questions; attorneys wanting to set up court dates; I would like to get married, when can I come in; can I have a continuance on my hearing; can I make payments on a fine; can I continue my next court appearance; when is my court date; how do I apply for a court appointed attorney; people wanting to talk with the judge; and drivers license questions.

17. If the situation arises, would you be willing to accept work from other clerk of court offices in the state? Comment: Examples of work could include microfilming or archiving documents, and becoming a floating clerk that travels out of your circuit.

____ Yes = 22
____ No = 15
____ Other (please explain) = 23

18. The following suggestions were identified by clerks as possible approaches to shifting workloads between rural and urban clerk of courts offices throughout the state. Your opinion on these approaches is very valuable to us. Please take your time when answering them and feel free to write down any issues/areas that have been overlooked.

A majority of explanations included: in terms of willingness to accept work, clerks indicate they would be willing but that their office was only open ½ time and they utilize deputies to work out of their offices; other clerks indicated that they already had a large workload and couldn't keep up with what they had; some clerks indicated they were new; other clerks suggested that it would not be feasible to accept work from other counties while working a 4-day work week; some clerks indicated they already used floating clerks.

19. The implementation of a 1-800 number designed to provide the public with clerk of court information would benefit my office?

____ Strongly agree = 10
____ Agree = 23
____ Disagree = 13
____ Strongly disagree = 5
____ Other (please explain) = 9

20. If you answered "other" to questions 19, please explain.

A majority of their suggestions included: it would work if the process was standardized; general information would be ok; not sure how it would work; some people want to talk with people they are familiar with in small counties; it would work if the system was automated.

21. A statewide payment-processing center (for matters able to be handled by power of attorney and not requiring personal appearance) would benefit my office.

____ Strongly agree = 5
____ Agree = 12
____ Disagree = 28
____ Strongly disagree = 9
____ Other (please explain) = 6

22. If you answered "other" to question 21, please explain.

A majority of their suggestions included: since the caseload for tickets aren't heavy, it would not benefit my office; my deputy can receipt money in 2 counties, this has already proven to be a disaster; would help some but we get a lot of questions concerning specific information regarding arrest; one clerk needed explanation of how the process would work and what are the benefits from the clerk's viewpoint and the public as well; and I do not like the idea because it would be very difficult to keep track of whether tickers were paid of needed reminder letters or warrants.

23. In your opinion, would you agree with the creation of statewide payment centers (similar to our statewide search centers) that could process traffic tickets and other financial transactions from one county to another?

____ Yes = 16
____ No = 32
____ Other (please explain) = 12

24. If you answered "other" to question 23, please explain:

A majority of explanations included: yes, if the information was generated back to the clerk with the citation; I believe you would lose some of that personal contact with your people and it would be easier to "lose them" in the shuffle; most of the suggestions in this survey are only going to benefit the larger counties, so being from a smaller county, it is difficult to answer the questions; I would support circuit wide payment center, but not statewide; and agree only if disbursements benefited the county that the action originated from.

25. A microfilm or archival processing center would benefit my office.
Comment: For example, smaller courts would prepare old records for scanning or microfilming.

____ Strongly agree = 11
____ Agree = 23
____ Disagree = 13
____ Strongly disagree = 4
____ Other (please explain) = 8

26. If you answered "other" to question 25, please explain.

A few of the comments included: we do not microfilm; we would be in favor of scanning files instead of microfilming; we would be glad to do it if we could be utilized as the processing center and if we could get the extra hours of work.

27. Offsite small claims processing (using electronic filing systems) would benefit my office.

____ Strongly agree = 4
____ Agree = 14
____ Disagree = 24
____ Strongly disagree =8
____ Other (please explain) = 9

28. If you answered "other" to question 27, please explain.

These responses consisted of: small claims customers often have many questions that need answers and this would be difficult with an offsite processing center; we would need information and details on how this process and how it would be handled; it would benefit my office only if we were utilized as the offsite processing center.

29. The development of a merge center designed to handle the verification of demographic data would benefit my office.

____ Strongly agree = 14
____ Agree = 39
____ Disagree = 1
____ Strongly disagree = 2
____ Other (please explain) = 4

30. If you answered "other" to question 29, please explain.
Responses included: I don't see how this will benefit my office; it would help the bigger counties; already done.

31. The creation of a jury summons processing center for qualifying jurors would help my office.

____ Strongly agree = 4
____ Agree = 18
____ Disagree = 24
____ Strongly disagree = 10
____ Other (please explain) = 4

32. If you answered "other" to question 31 please explain.
Comments included: each judge has their own qualifying rules; we would need more information before we form an opinion.

33. The availability of floating clerks would benefit my office.

____ Strongly agree = 10
____ Agree = 22
____ Disagree = 10
____ Strongly disagree = 3
____ Other (please explain) = 13

34. If you answered "other" to question 33 please explain.
These responses ranged from offices are not the same and it is difficult for the floating clerk to become familiar with the different policies in each office; this would be a benefit in emergency situations or when regular staff is gone on vacation or attending seminars or training sessions.

35. Setting up a correspondence center in which requests for information from the public would be sent to one site would benefit my office.

____ Strongly agree = 6
____ Agree = 18

____ Disagree = 22
____ Strongly disagree = 2
____ Other (please explain) = 12

36. If you answered "other" to question 35 please explain.

These responses included: it would depend on the type of information requested; if customers were able to directly contact the correspondence center and not be transferred from clerks' offices, this
would be fine; most requests concern specific information related to individual offices.

37. Please discuss or list the topics, issues, and approaches other than those discussed in questions 17 through 36 concerning the shifting of workloads between urban and rural courts we may have overlooked.

Responses indicated shifting workload can cause inefficiency and inaccuracy of information; having merge centers for processes that do not occur often and need to be researched, such as adoption, mental illness, juveniles, and search warrants would be beneficial; public relations would be compromised; this would cause additional stress on smaller offices and cause them to become less efficient.

38. Given that we may be changing our business practices, do you foresee the need for additional training?

____ Yes = 34
____ No = 10
____ Other (please explain) = 16

39. If you answered "other" to question 38 please explain.

Responses included: depends upon what type and how many changes in business practices; if changes were made there would be need for additional training.

40. What additional training do you feel you would want offered to the clerks? (please explain)

Clerks' responses ranged from computer training and training on new software, etc.; training on new procedures and programs to implement the changes proposed by this project; training on manual changes; training on legal terminology, documents, procedures; anything inquired by the public.

41. Would you say the population in your area is **aware** of most types of services provided by your office?

____ Yes = 42
____ No = 14
____ Other (please explain) = 3

42. If you answered no to Question 41 above, of which services do you feel the population in your area is **unaware**? (please explain)

The clerks that did not believe the public was aware of their services stated that most individuals in their areas were unaware that their offices offered passport, marriage, and small claims services. Others responded that most people are unaware what goes on in their offices and unfamiliar with many of their services.

43. If you answered "other" to question 41 please explain.

Those clerks who chose "other" as their response indicated the public expects them to know everything, such as when taxes are due or when the driver examiners are in town; the public also believes that clerks are there to give legal advice.

44. Concerning public access to services offered by your office, what issues need to be addressed? (please explain) Comment: For example, available office hours, access to information, accessing services by alternative methods, physical access.

Responses included: part-time office hours are inconvenient for the public; physical access to their offices, for example, the need for an elevator; we believe we are very accessible to the public; the need for public dissemination of services available.

45. How would you improve the public's access to services in your office? (please explain)

Many responses included having more office hours and informing the public of what services they provide.

46. In your office, what services are most requested? (please explain)

A majority of responses included: small claims; record searches; protection orders; payment of fines.

**APPENDIX E**
**COMPILED RESULTS OF SOUTH DAKOTA BAR ASSOCIATION SURVEY:**

Thank you for taking the time to complete this survey. This questionnaire is designed to identify areas that will improve citizen access to court services as well as court information across South Dakota. We encourage your comments as well as your ideas surrounding this issue and appreciate your contributions to this effort.

1. Are you a:

| | | | |
|---|---|---|---|
| __ Practicing member of the South Dakota Bar Association | = | 398 | (89%) |
| __ Circuit court judge | = | 13 | (3%) |
| __ Magistrate court judge | = | 8 | (2%) |
| __ South Dakota Supreme Court Justice | = | 1 | (.2%) |
| __ Other (In this category, most were retired or worked for the federal judiciary in some form or fashion) | = | 29 | (6%) |

2. How long have you been admitted to the South Dakota Bar?

| | | | |
|---|---|---|---|
| __ Less than 3 years | = | 28 | (6%) |
| __ 3 to 5 years | = | 34 | (8%) |
| __ 6 to 10 years | = | 76 | (17%) |
| __ 11 to 15 years | = | 58 | (13%) |
| __ 16 to 20 years | = | 61 | (14%) |
| __ More than 20 years | = | 187 | (42%) |
| __ Other (please explain)_____ | | | |

3. In which judicial district do you usually practice law?

__ District 1 = 110 (16%)
__ District 2 = 160 (24%)
__ District 3 = 96 (14%)
__ District 4 = 78 (11%)
__ District 5 = 66 (10%)
__ District 6 = 76 (11%)
__ District 7 = 93 (14%)
__ Other (please explain)_____

4. Most of my contact with clerks of court offices is in the following counties:
Most lawyers responded by listing many counties.

5. In your opinion, what are the type(s) of court service(s) for which the public has the greatest need? (please explain)
Suggestions made by a majority of respondents of the sample included: making payments; filing papers; and obtaining information.

6. In your opinion, what are the type(s) of court service(s) for which the public has little or no need? (please explain)

The main response to this question was that the public needed all services offered by the clerks of court offices and that all services were necessary.

7. What clerk of court services do you, your staff, and your clients use most often? (please list any and all)

Suggestions made by a majority of respondents included faxing and record searches.

8. What type of information from the clerk of court office would benefit you, your staff and your clients (i.e., information on court processes, etc)?

Suggestions made by a majority of respondents of the sample included: making information available about clerk of court services; filing papers; and record searches.

The following section contains questions designed to identify areas in which court services to the public may be improved. Each question asks you to determine the usefulness of this service but we also encourage your comments and have included a section for them after each question.

9. Have you ever visited the UJS website: www.sdjudicial.com?

Yes = 233 (53%)
No = 208 (47%)

10. If yes, what information did you find most helpful?

A majority of respondents did not respond to this question.

11. What information relating to clerk of court operations would you like to see added to the website?

A majority of respondents did not respond to this question.

12. If the clerks' office(s) you most frequently visit were open during alternative business hours, would you use services during these hours?

____ Yes = 245 (57%) Please check all that apply:
____ Before 8:00 a.m. = 71 (22%) Noon - 1:00 p.m. = 142 (43%);
____ After 5:00 p.m. = 115 (35%)
____ No = 183 (43%)

13. Given the following options, what is your preferred method of accessing clerk of court services? Please rank in order of preference (1 being the highest): Statistics listed are attorney's first choice.

___ In person = 197 (45%) ___ By mail = 79 (18%)

___ By phone = 136 (31%) ___ By fax = 3 (1%)
___ Other (please explain) = 22 (5%)

14. Assuming the availability of all of the following options, what would be your preferred method of accessing clerk of court services? Please rank in order of preference (1 being highest):

___ In person = 160 (37%) ___ By mail = 30 (7%)
___ By phone = 80 (19%) ___ By fax = 4 (.9%)
___ Electronic filing = 59 (14%) ___ Kiosk = 1 (.2%)
___ Online access to court records = 95 (22%)
___ Other (please explain) = 2 (.5%)

15. The implementation of a 1-800 number designed to provide the public with court service information would be helpful.

__ Strongly agree = 75 (17%)
__ Agree = 156 (36%)
__ Disagree = 118 (27%)
__ Strongly disagree = 57 (13%)
__ Other = 27 (6%)

Comment:

16. A state wide processing system that could process traffic tickets and other financial transactions from one county to another would be beneficial to the citizens in my area.

__ Strongly agree = 67 (16%)
__ Agree = 135 (32%)
__ Disagree = 116 (27%)
__ Strongly disagree = 51 (12%)
__ Other = 54 (13%)

Comment:

17. Please discuss or list topics, issues, and approaches other than those discussed above in questions 15 and 16, concerning the shifting of workloads between urban and rural courts that we may have overlooked and that would assist your office or your clients access services offered by our clerks of court.

There were very few new topics, issues, and approaches listed by attorneys.

18. If you live in a rural area of South Dakota, do you feel the clerk of court services are adequate for your area? (Please explain)

There were few responses to this question but they included: the clerks needing to be in the courtroom on court days; needing more clerks in all of the counties; and uniform guidelines should be implemented.

19. Are there clerk of court services used by you or your staff that you think could be made available to you in a more accessible manner? If so, describe the services and the manner of service that would best meet your needs.

Suggestions by a majority of respondents were no. However, a few suggestions were made including: extended office hours; sending and receiving faxes; electronic access to files; and to allow attorneys direct access to files.

20. Would you and your clients benefit if some court proceedings (i.e., small claims actions, certain motion hearings, arraignments, detention hearings, etc.) were conducted using video technology? Note: such use would not result in closing clerk's of court offices, but instead be used to access to courts.

One-hundred fifty (33%) of the attorneys indicated that using video technology in court proceedings would benefit them or their clients while one-hundred sixteen (26%) believed they would not benefit.

21. We encourage you to use the following space to make any other comments or observations relevant to the topics discussed in this survey.

Most attorneys did not make any further comments. However, a few of the comments concerned: the need for centralization; and the lack of need to make changes to clerks of court operations.

**APPENDIX F**
**COMPILED RESULTS OF SOUTH DAKOTA MAILED PUBLIC SURVEYS:**

**Thank you for taking the time to complete this survey. This questionnaire is designed to identify areas that will improve citizen access to court services as well as court information across South Dakota. Because the goal of this survey is to build services around citizen choices, your input is valuable to us in helping determine the best methods of providing court services in your county and across the state. We encourage your comments as well as your ideas surrounding this issue and appreciate your contributions to this effort.**

1. What county do you live in?

Minnehaha 29 (19.7%) county had the largest respondent representation in the survey followed by Pennington 9 (6.1%), Yankton 8 (5.4%), Clark 7 (4.8%) and Brown 7 (4.8%). Other results are as follows: Lincoln 6 (4.1%); Tripp 6 (4.1%); Brookings 4 (2.7%); Codington 4 (2.7%); Beadle 3 (2.0%); Butte 3 (2.0%); Clay 3 (2.0%); Fall River 3 (2.0%); Haakon 3 (2.0%); Hughes 3 (2.0%); Lake 3 (2.0%); Grant 3 (2.0%); Bon Homme 2 (1.4%); Charles Mix 2 (1.4%); Corson 2 (1.4%); Day 2 (1.4%); Dewey 2 (1.4%); Hutchinson 2 (1.4%); Lawrence 2 (1.4%); McCook 2 (1.4%); McPherson 2 (1.4%); Marshall 2 (1.4%); Spink 2 (1.4%); Buffalo 1 (.7%); Davison 1 (.7%); Deuel 1 (.7%); Douglas 1 (.7%); Edmunds 1 (.7%); Faulk 1 (.7%); Gregory 1 (.7%); Jerauld 1 (.7%); Jones 1 (.7%); Kingsbury 1 (.7%); Meade 1 (.7%); Mellette 1 (.7%); Moody 1 (.7%); Perkins 1 (.7%); Roberts 1 (.7%); Sanborn 1 (.7%); Stanley 1 (.7%); Todd 1 (.7%); Union 1 (.7%); Walworth 1 (.7%).

2. How long have you lived in that county?

__ 0 - 3 years = 10 (7%)
__ 4 - 7 years = 14 (10%)
__ 8 - 15 years = 19 (13%)
__ 16 or more years = 103 (70%)

3. What is your age group?

__ Under 18 = 0
__ Between 18 & 29 = 12 (8%)
__ Between 30 & 39 = 14 (10%)
__ Between 40 & 49 = 27 (18%)
__ Between 50 & 59 = 30 (20%)
__ Over 60 = 64 (44%)

4. Have you used clerk of court services in your county?

__Yes = 67 (46%)
__No (If you answered No, go to question 9) = 79 (54%)

5. If yes, when was the last time you used clerk of court services in your county?

__ Within the last 6 months = 32 (33%)
__ Within the last 12 months = 6 (6%)
__ Within the past 3-5 years = 15 (15%)
__ Within the past 11-15 years = 11 (11%)
__ Over 16 years ago = 33 (34%)

6. What services did you use the last time you visited your clerk of courts office? (Please list any and all)

   The majority of responses included: small claims; paying fines; and obtaining information

7. What clerk of court services do you use most often?

   The majority of responses included: filing papers; small claims; record searches; payment of fines; obtaining information; and jury duty

8. In your opinion, what are the types of clerk of court services for which the public has the greatest need? (please explain) (e.g., make a payment, file papers, court appearance, obtain passport, marriage service, record search, obtain information, etc.)

   Responses included: filing papers; making payments; obtaining information; and record searchers

9. In your opinion, what are the types of clerk of court services for which the public has little or no need? (please explain)

   The majority of responses included: obtaining marriage licenses; and passports

10. What information from the clerk of court office would benefit you and your family members (such as information on court processes, etc.)? (please list any and all)

    Responses included: information on court processing, times, and dates; know what services are available; and information on laws, rules and regulations

11. Have you ever visited the South Dakota Unified Judicial System's website: www.sdjudicial.com?

___ Yes = 9 (6%)
___ No = 134 (94%)

12. If yes, what information did you find most helpful?

    Responses included: general information; codified laws and statutes; and information on this project

13. What information relating to clerk of court operations would you like to see added to the website?

    Responses included: information on court processes; services offered by clerks and more public access to records and court processing

14. If the clerks' office(s) you most frequently visit were open during alternative business hours, would you use services during these hours?

____ Yes = 61 (48%). Please check all that apply:
____ Before 8:00 a.m. = 15 (25%); _____ Noon - 1:00 p.m. = 24 (40%);
____ After 5:00 p.m. = 21 (35%)
____ No = 66 (52%)

15. Given the following options, what is your preferred method of accessing clerk of court services? Please rank in order of preference (1 being their first choice):

___ In person = 93 (72%) ___ By mail = 14 (11%)
___ By phone = 23 (18%) ___ By fax = 0
___ Other (please explain) = 0

16. Assuming the availability of all of the following options, what would be your preferred method of accessing clerk of court services? Please rank in order of preference (1 being highest):

___ In person = 85 (64%) ___ By mail = 8 (6%)
___ By phone = 16 (12%) ___ By fax = 0
___ Electronic filing = 5 (4%) ___ Kiosk = 0
___ Online access to court records = 18 (14%)
___ Other (please explain) = 0

17. If you live in a rural area of South Dakota, do you feel the clerk of court services are adequate for your area? (Please explain)
63 respondents felt services were adequate
6 did not

The following section contains questions designed to identify areas in which clerk of court services to the public may be improved. Each question asks you to determine the usefulness of this service but we also encourage your comments and have included a section for them after each question.

18. The implementation of a 1-800 number designed to provide the public with general statewide clerk of court information would benefit me.

___ Strongly agree = 22 (18%)
___ Agree = 71 (57%)
___ Disagree = 25 (20%)
___ Strongly disagree = 6 (5%)
___ Other (please explain) = 0

19. In your opinion, would you agree with the creation of statewide payment centers that could process traffic tickets and other financial transactions from one county to another?

___ Yes = 100 (77%)
___ No = 30 (23%)
___ Other (please explain) = 0

20. Please discuss or list any other issues or approaches other than those discussed above in questions 18 and 19 that would help you or members of your family access clerk of court services.

Responses included: extended hours; online access; more answers to questions on proceedings; more courteous service; need for payment centers; child support services; and handicap accessibility in some courtrooms

21. Are there other clerk of court services you or your family use that you think could be made available to you in a more accessible manner? If so, please describe the services and the manner of service that would best meet your needs.

A majority of the responses included: answers to questions about court processing; how to fill our various documents; information on clerk services available; more information via computer; need for payment centers; and handicap accessibility issues

22. Do you feel you or your family members would benefit if some court proceedings (i.e., small claims actions, certain motion hearings, arraignments, detention hearings, etc.) were conducted using video technology? Note: such use would not result in closing clerk of court offices, but be used to increase access to courts.

yes = 41
no = 41

don't know = 10

23. We encourage you to use the following space to make any other comment or observations relevant to the topics discussed in this survey.

Many respondents did not know much about clerk services; others thought services were adequate and should not be changed.

**APPENDIX G**
**COMPILED RESULTS OF SOUTH DAKOTA ONSITE PUBLIC SURVEYS:**

**Thank you for taking the time to complete this survey. This questionnaire is designed to identify areas that will improve citizen access to clerk of court services as well as court information across South Dakota. Because the goal of this survey is to help develop ways to improve access to clerk of court services, your input is valuable to us in helping determine the best methods of providing clerk of court services in your county and across the state. We encourage your comments as well as your ideas surrounding this issue and appreciate your contributions to this effort.**

1. What county do you live in? Minnehaha = 16 (8.9%); Pennington = 15 (8.4%); and Davison = 13 (7.3%) had the largest respondent representation. Other counties include: Campbell = 11 (6.0%); Walworth = 11 (6.0%); Spink = 9 (4.9%); Codington = 8 (4.4%); Lake = 8 (4.4%); Kingsbury = 7 (3.9%); Deuel = 5 (2.8%); Dewey = 5 (2.8%); Lawrence = 5 (2.8%); Aurora = 4 (2.2%); Douglas = 4 (2.2%); Hyde = 4 (2.2%); McPherson = 4 (2.2%); Meade = 4 (2.2%); Yankton = 4 (2.2%); Bon Homme = 3 (1.6%); Edmunds = 3 (1.6%); Fall River = 3 (1.6%); Lincoln = 3 (1.6%); Lyman = 3 (1.6%); Union = 3 (1.6%); Brookings = 2 (1.1%); Brule = 2 (1.1%); Charles Mix = 2 (1.1%); Day = 2 (1.1%); Hutchinson = 2 (1.1%); Miner = 2 (1.1%); Roberts = 2 (1.1%); Bennett = 1 (.5%); Corson = 1 (.5%); Grant = 1 (.5%); Haakon = 1 (.5%); Hughes = 1 (.5%); Mellette = 1 (.5%); Moody = 1 (.5%); Perkins = 1 (.5%); Ziebach = 1 (.5%).

2. How long have you lived in that county?

__ 0 - 3 years = 17 (9%)
__ 4 - 7 years = 14 (8%)
__ 8 - 15 years = 19 (10%)
__ 16 or more years = 131 (72%)

3. What is your age group?

__ Under 18 = 0
__ Between 18 & 29 = 20 (11%)
__ Between 30 & 39 = 31 (17%)
__ Between 40 & 49 = 58 (32%)
__ Between 50 & 59 = 41 (23%)
__ Over 60 = 30 (17%)

4. What clerk of court service(s) did you use today?
   The most common responses to this open-ended question were record searches, small claims, and obtaining information.

5. Before today, have you used clerk of court services in your county?

__Yes = 154 (85%)

__No (If you answered No, go to question 9) = 27 (15%)

6. If yes, when was the last time you used clerk of court services in your county?

__ Within the last 6 months = 119( 78%)
__ Within the last 12 months = 14 (9%)
__ Within the past 3-5 years = 13 (8%)
__ Within the past 11-15 years = 6 (4%)
__ Over 16 years ago = 1 (1%)

7. What services did you use the last time you visited your clerk of courts office? (Please list any and all)

These open-ended responses included: small claims; paying fines; and obtaining information

8. What clerk of court services do you use most often?

The majority of responses included: filing papers; small claims; record searches; and payment of fines.

9. In your opinion, what are the types of clerk of court services for which the public has the greatest need? (please explain) (e.g., make a payment, file papers, court appearance, obtain passport, marriage service, record search, obtain information, etc.)

Responses included: filing papers; making payments; obtaining information; and record searches.

10. In your opinion, what are the types of clerk of court services for which the public has little or no need? (please explain)

The two services identified as having little or no need were obtaining marriage licenses and passports.

11. What information from the clerk of court office would benefit you and your family members (such as information on court processes, etc.)? (please list any and all)

The majority of responses included: information about court processes, times, and dates; knowing what services are available; and information on laws, rules and regulations.

12. Have you ever visited the South Dakota Unified Judicial System's website: www.sdjudicial.com?

___ Yes = 25 (14%)
___ No = 157 (86%)

13. If yes, what information did you find most helpful?

Two respondents (a majority) replied that the child support calculator was most helpful.

14. What information relating to clerk of court operations would you like to see added to the website?

Some responses included: information on court processes; services offered by clerks; and more public access to records and court proceedings.

15. If the clerks' office(s) you most frequently visit were open during alternative business hours, would you use services during these hours?

____ Yes. = 78 (44%) Please check all that apply:
____ Before 8:00 a.m. = 20 (27%); _____ Noon - 1:00 p.m. = 32 (43%);
____ After 5:00 p.m. = 23 (31%)
____ No = 99 (56%)

16. Given the following options, what is your preferred method of accessing clerk of court services? Please rank in order of preference (1 being the their first choice):

___ In person = 143 (83%) ___ By mail = 3 (2%)
___ By phone = 27 (16%) ___ By fax =
___ Other (please explain)

17. Assuming the availability of all of the following options, what would be your preferred method of accessing clerk of court services? Please rank in order of preference (1 being highest):

___ In person = 128 (75%) ___ By mail = 4 (2%)
___ By phone = 18 (11%) ___ By fax =
___ Electronic filing = 2 (1%) ___ Kiosk = 1 (.6%)
___ Online access to court records = 17 (10%)
___ Other (please explain)

18. If you live in a rural area of South Dakota, do you feel the clerk of court services are adequate for your area? (Please explain)

85 felt it was adequate
25 did not

The following section contains questions designed to identify areas in which clerk of court services to the public may be improved. Each question asks you to determine the usefulness of this service but we also encourage your comments and have included a section for them after each question.

19. The implementation of a 1-800 number designed to provide the public with general statewide clerk of court information would benefit me.

___ Strongly agree = 28 (17%)
___ Agree = 83 (51%)
___ Disagree = 32 (20%)

___ Strongly disagree = 21 (13%)
___ Other (please explain)

20. In your opinion, would you agree with the creation of statewide payment centers that could process traffic tickets and other financial transactions from one county to another?

___ Yes = 95 (56%)
___ No = 74 (44%)
___ Other (please explain)

21. Please discuss or list any other issues or approaches other than those discussed above in questions 19 and 20 that would help you or members of your family access clerk of court services.

Some other issues or approaches mentioned were online access and extended office hours.

22. Are there other clerk of court services you or your family use that you think could be made available to you in a more accessible manner? If so, please describe the services and the manner of service that would best meet your needs.

Again, online access and extended business hours were mentioned.

23. Do you feel you or your family members would benefit if some court proceedings (i.e., small claims actions, certain motion hearings, arraignments, detention hearings, etc.) were conducted using video technology? Note: such use would not result in closing clerk of court offices, but be used to increase access to courts.

yes = 31 no = 82

24. We encourage you to use the following space to make any other comment or observations relevant to the topics discussed in this survey.

Some comments included: clerks are doing a good job; the need for extended office hours; keep offices open in our counties; don't consolidate offices.

**APPENDIX H**
**Compiled Results of Court Users'**
**(Attorneys and Public) Surveys By Question and Group**

Guide to Abbreviations Used:
PHO = Public Handout survey
PM = Public Mailed survey
Atty = Attorney survey

What services used that day: record searches, small claims, get information (PHO)

If ever used services before that day: 84.6% yes, 14.8% no (PHO)

If ever used services: 53.7% no, 45.6% yes (PM)

Last time used services: 65.4% w/n last 6 mos. (PHO); 21.8% w/n last 6 mos. (PM)

Type of services last used: small claims, record searches, making payments, filing papers (PHO); small claims, paying fines, obtaining information (PM)

Type of services used most often: filing papers, small claims, record searches (PHO); filing papers, small claims, record searches, paying fines (PM); faxing, record searches (Atty)

Most important service/greatest public need: filing papers, making payments, record searches (PHO); making payments, filing papers, obtaining information (Atty)

Little or no need: marriage licenses, passports (PHO); marriage licenses, passports (PM); passports, marriage licenses – though majority responded the public needs all the clerk of court services (Atty)

Services that would benefit them/family: explanations on court processes (PHO); information on court processes (& times/dates), knowing what services are available, info on laws, rules, regulations (PM); making information about clerk of court services available, filing papers, record searches (Atty)

Visited UJS website: 86.3% no (PHO); 91.2% no (PM); 51.5% yes, 46% no (Atty)

Most helpful info on website: child support calculator (PHO); general information, statutes, information on SJI grant project (PM)

Information to add to website: instructions on how to file documents, more public access to records and court proceedings (PHO); information on court processes, services offered by clerks, public access to records and court proceedings (PM)

Alternative business hours: 42.9% would use alternative hours, 17.6% preferred noon-1 pm (PHO); 41.5% would use alternative hours, after 5 pm was most preferred (PM); 24% favor noon-1 pm (Atty)

Preferred method of accessing services: 78.6% in person, 14.8% phone (PHO); 63.3% in person, 15.6% phone (PM); 43.6% in person, 30.1% phone (Atty)

Preferred method of accessing services assuming other options: 70.3% in person, 9.3% online (PHO); 57.8% in person, 12.2% internet (PM); 43.6% in person, 30.1% phone (Atty)

Adequacy of clerk services: 46.7% yes, 13.7% no (PHO); 42.9% yes, 4.1% no (PM); clerks need to be in courtroom on court days, need more clerks in all counties, uniform guidelines should be implemented (Atty)

1-800 number/statewide clerk info: 45.6% agree (PHO); 48.3% agree (PM); 34.5% agree (Atty)

Payment processing center (offenses not requiring court appearance): 29.9% agree (Atty)

Payment processing center (traffic tickets, etc.): 52.2% agree, 40.7% do not (PHO); 68% agree, 20.4% do not (PM);

Other issues/approaches: online access, extended hours (PHO); extended hours, online access, more answers to questions re proceedings, more courteous service, need for payment centers, child support services, handicap accessibility (PM)

Other services made more accessible: online access, extended hours (PHO); answer questions re court processing, how to fill out documents, information on clerk services available, more information available online, need for payment centers, handicap accessibility (PM); extended office hours, send/receive faxes, electronic access to files, attorney direct access to files (Atty)

Video technology ct. proceedings: 45% no (PHO); 27.9% yes, 27.9% no (PM); 33.2% yes, 25.7% no (Atty)

Other comments: clerks doing good job, extend hours, keep clerk offices in county and do not consolidate offices or services (PHO); don't know much about clerk services, services adequate and don't change (PM); need to centralization, lack of need for any changes in clerk of court operations (Atty)

**APPENDIX I**
**SURVEY OF STATE COURT ADMINISTRATORS**
**ON STATE COURT RECORD ELECTRONIC ACCESS POLICIES**

1. Does your state currently provide access (other than internally to court staff and judges) to court records by electronic means?

2. Does your state court system have a statewide rule, statute and/or written policy [hereinafter, policy] that governs electronic access to court records?
_____ Yes _____ No. (If you are in some stage of development of such a statewide rule or policy, please answer yes, explain briefly and continue.) (If you answered no, please proceed to Question 13).

3. When was that policy implemented and when has it been revised or amended?

4. How was the policy developed and by whom? (i.e. committee appointed by state supreme court, administrative office of the courts, other?) Was there opportunity for public comment prior to the policy's adoption?

5. What is the current status of your state's electronic access policy (i.e. adopted by state supreme court, pilot project, still in committee, other)?

6. Specifically, what information does your electronic access policy make available online? Does availability include all documents within a case file? Is availability limited to docket/index/calendar information?

7. Under your state's policy, is there any information in the court record that is specifically restricted from electronic access? If so, what is restricted? Is this same information available in the paper record?

8. How is access made available? (i.e., is the information available on the court's secure website, on the Internet, only by computer in the clerks' offices, other method)?

9. Do you provide access to bulk databases? Is access to this information restricted in any way and if so, how/what is restricted? What distribution method is used (i.e. download)?

10. Is electronic access to court record information available to the public? Selected group of users only, such as parties and attorneys? Other?

11. Is the level of access different for different groups of users? Is the available method of access different for different groups of users? Please explain.

12. Is there a charge for electronic access to court records? How is access charged, how much are the fees, and what method of collection is used?

13. Is access to court records in your state governed by statute, court rule, policy document, or a combination thereof?

14. Please list citations to all statutes, court rules, orders and policies and constitutional provisions that govern court records in your state, including electronic access to those records.

15. Is there a contact person in your state court system for electronic access policy information? Please list that person's name and contact information.

16. Please add any other comments about these issues that are perhaps not addressed in the questions above. **Thank you very much for your participation in this survey.**

Please call or contact me with any comments or questions you have in completing this survey. Also, please indicate if you would like me to send you a copy of the final results of this survey.
_____ Yes _____ No

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**APPENDIX J**
**SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM**
**COURT RECORDS RULE**
**SDCL ch. 15-15A (eff. July 1, 2004)**

**SDCL 15-15A-1. Purpose of rule of access to court records.**

The purpose of this rule is to provide a comprehensive policy on access to court records. The rule provides for access in a manner that:

(1) Maximizes accessibility to court records,
(2) Supports the role of the judiciary,
(3) Promotes governmental accountability,
(4) Contributes to public safety,
(5) Minimizes risk of injury to individuals,
(6) Protects individual privacy rights and interests,
(7) Protects proprietary business information,
(8) Minimizes reluctance to use the court to resolve disputes,
(9) Makes most effective use of court and clerk of court staff,
(10) Provides excellent customer service, and
(11) Does not unduly burden the ongoing business of the judiciary.

The rule is intended to provide guidance to 1) litigants, 2) those seeking access to court records, and 3) judges, court and clerk of court personnel responding to requests for access.

**SDCL 15-15A-2. Who has access to court records under the rule.**

Every member of the public has the same access to court records as provided in this rule, except as provided otherwise by statute or rule and except as provided in § 15-15A-7.

"Public" includes:

(1) any person and any business or non-profit entity, organization or association;
(2) any governmental agency for which there is no existing policy, statute or rule defining the agency's access to court records;
(3) media organizations.

"Public" does not include:

(4) court or clerk of court employees;
(5) people or entities, private or governmental, who assist the court in providing court services;
(6) public agencies whose access to court records is defined by another statute, rule, order or policy;
(7) the parties to a case or their lawyers regarding access to the court record in their case, which may be defined by statute or rule.

**SDCL 15-15A-3. Definition of terms.**

(1) "Court record" includes any document, information, or other thing that is collected, received or maintained by a clerk of court in connection with a judicial proceeding. "Court record" does not include other records maintained by the public official who also serves as clerk of court or information gathered, maintained or stored by a governmental agency or other entity to which the court has access but which is not part of the court record as defined in this section.

(2) Information in a court record "in electronic form" includes information that exists as: (a) electronic representations of text or graphic documents; (b) an electronic image, including a video image, of a document, exhibit or other thing; or (c) data in the fields or files of an electronic database.

(3) "Public access" means that the public may inspect and obtain a copy of the information in a court record unless otherwise prohibited by statute, court rule or a decision by a court of competent jurisdiction. The public may have access to inspect information in a court file upon payment of applicable fees.

(4) "Remote access" means the ability to electronically search, inspect, or copy information in a court record without the need to physically visit the court facility where the court record is maintained.

**SDCL 15-15A-4. Applicability of rule.**

This rule applies to all court records, regardless of the physical form of the court record, the method of recording the information in the court record or the method of storage of the information in the court record.

**SDCL 15-15A-5. General access rule.**

(1) Information in the court record is accessible to the public except and as prohibited by statute or rule and except as restricted by § 15-15A-7 or § 15-15A-10.

(2) There shall be a publicly accessible indication of the existence of information in a court record to which access has been restricted, which indication shall not disclose the nature of the information protected, i.e., "sealed document."

(3) An individual circuit or a local court may not adopt a more restrictive access policy or otherwise restrict access beyond that provided by statute or in this rule, nor provide greater access than that provided for by statute or in this rule.

**SDCL 15-15A-6. Court records that are only publicly available at a court facility.**

A request to limit public access to information in a court record to a court facility in the jurisdiction may be made by any party to a case, an individual identified in the court record, or on the court's own motion. For good cause, the court will limit the manner of public access. In limiting the manner of access, the court will use the least restrictive means that achieves the purposes of this access rule and the needs of the requestor.

**SDCL 15-15A-7. Court records excluded from public access.**

The following information in a court record is not accessible to the public:

(1) Information that is not to be accessible to the public pursuant to federal law;
(2) Information that is not to be accessible to the public pursuant to state law, court rule or case law as follows;
(3) Examples of such state laws, court rules, or case law follow. Note this may not be a complete listing and the public and court staff are directed to consult state law, court rules or case law. Note also that additional documents are listed below that may not be within court records but are related to the court system; the public and court staff should be aware of access rules relating to these documents.
    (a) Abortion records (closed); § 34-23A-7.1
    (b) Abuse and neglect files and records (closed, with statutory exceptions); § 26-8A-13
    (c) Adoption files and adoption court records (closed, with statutory exceptions); §§ 25-6-15 through 25-6-15.3
    (d) Affidavit filed in support of search warrant (sealed if so ordered by court, see statutory directives); § 23A-35-4.1
    (e) Attorney discipline records (closed until formal complaint has been filed with Supreme Court by the State Bar Association's Disciplinary Board or Attorney General, accused attorney requests matter be public, or investigation is premised on accused attorney's conviction of a crime); §16-19-99
    (f) Civil case filing statements (closed); §15-6-5(h)
    (g) Coroner's inquest (closed until after arrest directed if inquisition finds criminal involvement with death); § 23-14-12
    (h) Custody or visitation dispute mediation proceedings pursuant to § 25-4-60 (closed, inadmissible into evidence)
    (i) Discovery material (closed unless admitted into evidence by court) §§ 15-6-26(c); 15-6-5(g)
    (j) Domestic abuse victim's location (closed, with statutory exception); § 25-10-39
    (k) Employment examination or performance appraisal records maintained by Bureau of Personnel (closed); § 1-27-1
    (l) Grand jury proceedings (closed with statutory exceptions); § 23A-5-16
    (m) Guardianships and conservatorships (closed with statutory exceptions); § 29A-5-311

(n) Involuntary commitment for alcohol and drug abuse (petition, application, report to circuit court and court's protective custody order sealed; law enforcement or prosecutor may petition the court to examine these documents for limited purpose); § 34-20A-70.2
(o) Judicial disciplinary proceedings (closed until Judicial Qualifications Commission files its recommendation to Supreme Court, accused judge requests matter be public, or investigation is premised on accused judge's conviction of either a felony crime or one involving moral turpitude); ch. 16-1A, Appx. III(1)
(p) Juvenile court records and court proceedings (closed with statutory exception); §§ 26-7A-36 through -38; §§ 26-7A-113 through -116
(q) Mental illness court proceedings and court records (closed); §§ 27A-12-25; 27A-12-25.1 through -32
(r) Pardons (statutory exceptions, see § 24-14-11)
(s) Presentence investigation reports (closed); §§ 23A-27-5 through -10; § 23A-27-47
(t) Probationer under suspended imposition of sentence (record sealed upon successful completion of probation conditions and discharge); §§ 23A-27-13.1; 23A-27-17
(u) Records prepared or maintained by court services officer (closed except by specific order of court); § 23A-27-47
(v) Trade secrets (closed); § 15-6-26(c)(7)
(w) Trusts (sealed upon petition with statutory exceptions); § 21-22-28
(x) Voluntary termination of parental rights proceedings and records (closed except by order of court); § 25-5A-20
(y) Wills (closed with statutory exceptions); § 29A-2-515
(z) Written communication between attorney and client; attorney work product (closed unless such privilege is waived); ch. 16-18, Appx. Rule 1.6
(aa) Information filed with the court pending in camera review (closed)
(bb) Any other record declared to be confidential by law; § 1-27-3.

**SDCL 15-15A-8. Requests for bulk distribution of court records.**

Dissemination of bulk information for resale is prohibited pursuant to § 1-27-1. Any other bulk dissemination is prohibited except as authorized by the State Court Administrator or the Chief Justice of the Supreme Court.

**SDCL 15-15A-9. Access to compiled information from court records.**

(1) Compiled information is defined as information that is derived from the selection, aggregation or reformulation by the Supreme Court of some of the information from more than one individual court record.

(2) Any member of the public may request compiled information that consists solely of information that is publicly accessible and that is not already available in an

existing report. The Supreme Court may compile and provide the information if it determines, in its discretion, that providing the information meets criteria established by the Court, that the resources are available to compile the information and that it is an appropriate use of public resources. The State Court Administrator's Office will make the initial determination as to whether to provide the compiled information.

(a) Compiled information that includes information to which public access has been restricted may be requested by any member of the public only for scholarly, journalistic, political, governmental, research, evaluation, or statistical purposes.

(b) The request shall a) identify what information is sought; b) describe the purpose for requesting the information and explain how the information will benefit the public interest or public education, and c) explain provisions for the secure protection of any information requested to which public access is restricted or prohibited.

(c) The Supreme Court may grant the request and compile the information if it determines that doing so meets criteria established by the Court, is consistent with the purposes of the access rules, that the resources are available to compile the information, and that it is an appropriate use of public resources.

(d) If the request is granted, the Supreme Court may require the requestor to sign a declaration that:

(i) The data will not be sold or otherwise distributed directly or indirectly, to third parties, except for journalistic purposes;
(ii) The information will not be used directly or indirectly to sell a product or service to an individual or the general public, except for journalistic purposes; and
(iii) There will be no copying or duplication of information or data provided other than for the stated scholarly, journalistic, political, governmental, research, evaluation, or statistical purpose.

The Supreme Court may make such additional orders as may be needed to protect information to which access has been restricted or prohibited.

**SDCL 15-15A-10. Requests to prohibit public access to information in court records.**

A request to prohibit public access to information in a court record may be made by any party to a case, the individual about whom information is present in the court record, or on the court's own motion. Notice of the request must be provided to all parties in the case and the court may order notice be provided to others with an interest in the matter. The court shall hear any objections from other interested parties to the request to prohibit public access to information in

the court record. The court must decide whether there are sufficient grounds to prohibit access according to applicable constitutional, statutory and common law. In deciding this the court should consider the purpose of this rule as set forth in § 15-15A-1. In restricting access, the court will use the least restrictive means that will achieve the purposes of this access rule and the needs of the requestor.

**SDCL 15-15A-11. When court records may be accessed.**

(1) Court records will be available where available for public access in the courthouse during hours established by the court. Court records in electronic form to which the court allows remote access under this rule will be available for access at least during the hours established by the court for courthouse access, subject to unexpected technical failures or normal system maintenance announced in advance.

(2) Upon receiving a request for access to information the court will respond within a reasonable time regarding the availability of the information and provide the information within a reasonable time.

**SDCL 15-15A-12. Fees for accessing court records.**

The Supreme Court may charge a fee for access to and copies of court records in electronic form, for remote access or compiled information. The fee shall be reasonable and may include costs for labor, materials and supplies. Fees for record searches are set forth in § 16-2-29.5. Some entities, and other entities under certain conditions, are exempt from paying a record search fee pursuant to § 16-2-29. Copying and certification fees shall be charged as determined by statute or Supreme Court Rule.

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